(19,302.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 227.

NICHOLAS J. STEIGLEDER AND CHRISTINA STEIGLEDER, HIS WIFE, APPELLANTS,

vs.

KATHERINE AUGUSTE McQUESTEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

INDEX.

	Original.	Print.
Caption	a	1
Bill of complaint	1	1
Answer	9	7
Memorandum decision on motion to dismiss for want of jurisdiction	16	11
Memorandum decision on the merits	19	13
Decree	25	17
Judge's certificate on question of jurisdiction	28	18
Testimony of complainant	31	20
Defendant Nicholas J. Steigleder	35	23
Elizabeth Bamburger	38	26
Complainant in rebuttal	39	26
Walter F. McQuesten	41	27
Elmira S. McQuesten	41	28
Complainant's Exhibit E—Letter from "Joe" to "Kathie," December 18, 1901	43	28
U—Letter from "Joe" to "Kathie," January 21, 1902	45	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1904.

	Original.	Print
Defendants' Exhibit 2—Letter from "Katie" to "Joe," February 7, 1902	48	31
Complainant's Exhibit C—Letter from "Joe" to "Kathie," February 28, 1902	49	31
Defendants' Exhibit 3—Letter from "Katie" to "Joe," May 20, 1902	50	32
Complainant's Exhibit L—Promissory note of Nicholas J. Steigleder, March 15, 1902	52	33
M—Memorandum of agreement between N. J. Steigleder and Mrs. K. A. McQuesten, October 15, 1902	53	33
Judge's certificate	54	34
Appeal	55	34
Order allowing appeal	56	35
Assignment of errors	57	35
Bond on appeal	58	36
Stipulation as to transcript of record	60	37
Citation and service (copy)	61	37
Clerk's certificate	62	38
Citation and service (original)	63	39

a In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

KATHERINE AUGUSTE MCQUESTEN, Complainant and Appellee,
vs.
NICHOLAS J. STEIGLEDER and CHRISTINA STEIGLEDER, His Wife, Respondents and Appellants.
No. 1046.

Record on Appeal.

Appeal from the circuit court of the United States for the district of Washington, northern division, to the Supreme Court of the United States.

1 In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

KATHERINE AUGUSTE MCQUESTEN, Complainant,
vs.
NICHOLAS J. STEIGLEDER and CHRISTINA Steigleder, His Wife, Defendants.
No. 1046.
Bill of Compiaint.

To the judges of the circuit court of the United States for the district of Washington, northern division:

Katherine Auguste McQuesten, a citizen of the United States and of the State of Massachusetts, and residing at Turner's Falls in said State, brings this her bill of complaint against Nicholas J. Steigleder and Christina Steigleder his wife, citizens of the State of Washington, and residing at the city of Seattle, in said State, and thereupon your oratrix complains and alleges:

I.

That the defendants are now, and at all times in this complaint mentioned were, husband and wife.

II.

That the complainant is a widow and the sister of the defendant, Nicholas J.; that for many years prior to the 5th day of January 1902, she had been in business at Turner's Falls, Massachusetts, on her own account; that the defendants came to the city of Seattle during the year 1895; that the defendant Nicholas J. began writing to the complainant during the year 1901 advising her to close up her business in Turner's Falls, Massachusetts and invest her money in

Seattle; and represented to her the great advantages of
2 making such a change in the investment of her money and means; that in his letters he expressed great solicitude about her health and her advancing age, and urged her to close her said business because it had become too great a burden on her strength to carry it on, and he offered to make investments for her in Seattle, but in none of his letters to the complainant did he state or hint that he would charge her any commission or any share of the profits made from such investments, but on the contrary, at all times led the complainant to believe that his interest in her welfare was the sole motive that prompted him in the advice he gave the complainant, and in his offer to assist her in the investment of her money and means in Seattle; that because of his relationship to her, and of the deep interest he expressed in her welfare, and of his assurance of the advantages to be gained by investments in Seattle real estate, the complainant confided in and trusted the defendant Nicholas J. and believed that he would so invest her money as to produce the best results, and that he would not take any advantage of her situation to make a secret profit for himself out of such investments as she might trust him to make.

III.

That in a letter written on or about the 21st day of January, 1902, the defendant Nicholas J. urged the complainant to forward to him as her agent and trustee, a sum of money to be invested by him in the purchase of real estate for her in Seattle; that in said letter he repeated the advice he had previously given, as hereinbefore set forth, and again repeated the advantages that would accrue to the complainant by making investments in Seattle real estate through him; that in response to said letter the complainant forwarded to him the sum of $3,600 to be invested by the defendant Nicholas J. in the purchase of real estate for her by him, and trusted to him and to his judgment to invest said money in the purchase of real estate.

3 IV.

That on or about the 14th day of March 1902 with the said money so forwarded as aforesaid, the defendant Nicholas J. purchased from Annie C. Grun the lands and tenements situated in the city of Seattle, King county, Washington, and described as follows: Lots three (3) and four (4), block thirty-seven (37) of D. T. Denny's Third addition to North Seattle according to the recorded plat thereof. That the defendant Nicholas J. purchased said property for the sum of $8,000., and took the conveyance thereof directly to himself as grantee, but as trustee for the complainant, and gave a mortgage back to the said Annie C. Grun for the sum of $4,000, representing one-half the purchase price of the said premises, which mortgage the complainant afterwards paid, and procured to be discharged.

V.

That after making the said purchase as aforesaid, and on or about the 14th day of March 1902, the defendant Nicholas J. in a letter to the complainant made the following statement of the circumstances attending said purchase:

"Have looked over the ground for a good investment for you for all this time, and looked over a great many pieces of property and found a few that would have answered the purpose on a pinch. But it was a difficult matter to decide on the right thing, although there are lots in the market. The principal drawback was that I was kind of restricted in the amount, and after a few talks with Mrs. Bamberger, who is a pretty shrewd woman, and also very much taken up with this place, we came to some conclusions, which I hope will be satisfactory all around.

I found a piece of property, of which I was told by the agent having charge of it, that the owner *might* sell, and that the price was $10,000. There is six houses on the lot, which is 120 x 120 feet, while most of the other places that are being offered are rather narrow, 60 x 100, or 74 x 60, or something like that, and besides, rather out of the way. However, this property is fine property, the houses a little old, perhaps 12 years, but very roomy and on account of their convenience, always rented.

In order to get hold of this property I had to strain myself considerably, and made a deal now in the following manner. I bought, and have made a deposit until I have the abstract examined by a lawyer, for you, four houses, the price of which is $6,000;
4 and with the help of Mrs. Bamberger, the remaining two houses, for $3,000. By raising some cash between us and making a deal for some lots we could make the first payment up, so there is only a balance of $4,000 left, for which I give a mortgage.

As soon as the papers are made out properly, I will send you some more particulars about this, and would say that on paying $2,500 more, your property will be paid up in full, and at the present rate bring you $80 a month rent. For our houses we have to pay $1,500 more, and as long as you only get small interest on your money in the bank, I thought you had better take up the whole mortgage of $4,000. I could then pay from the rent of the houses every year the interest to you, and about $300 towards the purchasing price, and in this way we could pay that off in five years from the earnings of the houses."

Whereas, in truth and in fact, the defendant Nicholas J. had paid but $8,000 for all of the said premises; that he had purchased the same in his own name but as trustee for the complainant, and had given back a mortgage of $4,000 to secure one-half of the purchase money, and that the balance of $4,000 was paid by the defendant Nicholas J. with $3,600 of the complainant's money and with $400 of money belonging to the defendant Nicholas J. who furnished and paid no more than the said $400 toward the said purchase money.

VI.

That the defendant Nicholas J. never informed the complainant of the true amount of the purchase price, nor the terms and conditions of the said purchase, nor the condition and situation of said property, and she never learned the amount paid for said property until on or about the 16th day of October, 1902; that on or about the day and year last aforesaid, she learned for the first time that the purchase price of all of said property was $8,000 instead of $9,000, and that the defendant Nicholas J. had not contributed to the said purchase $1,500 as he had represented to the complainant, but instead thereof, only $400 as hereinbefore charged.

VII.

That the said premises are not so situated that the same can be divided without serious loss to the buildings; that on the said
5 lands are a row of houses or flats, built together, facing the street and covering the entire frontage of said lots, and without any regard to the sub-division of the said lots; that the said houses are built as one house with partition walls merely, and were not so built that a line can be run through the land and divide the houses into separate tenaments, and that the line between that part of the said premises retained by the said defendants and that part conveyed by them to the complainant, as hereinbefore mentioned, does not coincide with the partition wall between any two of said tenements and a division of said tenements on said line would result in the destruction or serious loss of said buildings.

VIII.

That on the 5th day of April, 1902, without informing the complainant of the terms and conditions of the said purchase, and while she was acting under the belief that said property had cost $9,000, and while she was wholly ignorant of the said conditions of said property, and of the impossibility of dividing the same without loss or injury, the defendants made, executed, acknowledged and placed on record a deed to the complainant of that part of the said property described as follows: lot three (3) and the north twenty (20) feet of lot four (4) of block thirty-seven (37) of D. T. Denny's Third addition to North Seattle, which conveyance was never submitted to the complainant, but the defendant Nicholas J. managed the entire matter of said conveyance and made the same as he saw fit, without regard to the complainant's right in said premises, and the said defendants retained and still retain the title to the south forty (40) feet of said lot four (4) of said block thirty-seven (37) which property so retained by the said defendants is worth the sum of $2,666.66, and the separation of the said land so retained by the defendants from the remainder of said property will depreciate and lessen the value
6 of the lands conveyed as aforesaid to the complainant at least $750.

XI.

That the defendants did not, nor did either of them, ever submit to the complainant that in order to complete the said purchase on her own account, it was necessary for her to furnish an additional sum of money, but the said purchase was made by the said defendant Nicholas J. in his own way and according to his own judgment, but in trust for the complainant, and without giving the complainant any opportunity to inquire into the advisability of making the said purchase, or the manner of making it, or of joining with her in the said purchase, and she hereby elects to take the entire purchase in her own account.

XII.

That on the representations of the defendant Nicholas J. that it would be to the advantage of the complainant to pay off the said mortgage of $4,000 on the entire premises, she paid the said mortgage and procured a release thereof, releasing all of said property from the lien of said mortgage; that the defendant Nicholas J. further represented to the claimant that in case he failed to have granted to her what his share of such mortgage debt was good security for his said share, and on the further representation that its share was $1,500, the complainant accepted from the defendant, Nicholas J. his promissory note for $1,500, due in five years from the 13th day of March, 1902, bearing interest at only 3 % per annum. That the complainant accepted the said note because of her confidence in the said Nicholas J. and relying on his representations that the same was good security for said sum. That the defendant Nicholas J. had previously promised to pay said sum of $1,500 in yearly instalments of $300 each, but she accepted said note on his promise to pay said note in yearly payments as aforesaid, and he paid to the complainant $250 prior to the 1st day of October, 1902.

XI.

That the defendants have received the rents for part of the said tenements for the seven months last past, that said rents amount to $40 per month, which said rents, over and above any disbursements made by the said defendants on account of said premises, amount to more than the said sum of $200 paid to the complainant by the defendants.

XII.

That on the 31st day of October the complainant tendered back to the defendant Nicholas J. his said promissory note, and offered to pay to him any balance due him of the said money advanced by him toward said purchase, and demanded from the defendants a conveyance to the said complainant of said premises to-wit, the south forty (40) feet of lot four (4) in block thirty-seven (37) of D. T.

Denny's Third addition to North Seattle, according to the recorded plat thereof, and the complainant hereby offers to pay to the defendants any sum that may be due them or either of them on account of the said trust, or the purchase of the said property.

XIII.

Forasmuch as your oratrix is without relief in the premises at and by the strict rules of the common law, and can be relieved in this court only, to the end therefore that Nicholas J. Steigleder and *Christina Steigleder his wife*, be made parties defendant hereto and summoned to appear and answer this bill, but not upon oath (answer under oath being hereby expressly waived), and that as fully and particularly as if the several allegations of the foregoing bill were here again repeated and the defendants thereto particularly interrogated; that the defendants and each of them be required to set forth the origin and evidence of their title; that
8 the defendants be decreed to hold in trust for the complainant the title to the south forty (40) feet of lot four (4) block thirty-seven (37) of D. T. Denny's Third addition to North Seattle, and that the defendants be decreed to release and convey the said lands and tenements to the complainant and that in default of the execution of such conveyance that a commissioner be appointed to make the same according to the statute in such case made and provided; that a receiver of the rents and profits of the last mentioned lands and premises be appointed and that the defendants be enjoined from conveying the said lands and premises, and that an injunction *pendente lite* issue out of this court enjoining the said defendants from conveying the said premises; that the complainant recover her costs and disbursements in this suit; and that she be granted such other relief in the premises as shall be agreeable to equity and good conscience.

May it please the court to grant unto the complainant not only the writ of injunction above prayed for, but also the writ of subpœna of the United States of America to be directed to the said defendants Nicholas J. Steigleder and Christina Steigleder, commanding them by a certain day to appear and answer this bill, and to abide by such order and decree in the premises as shall be agreeable to equity and good conscience.

MRS. KATH. A. McQUESTEN,
Complainant.

McKAY, CARKEEK & CHILDE,
Solicitors and of Counsel for Complainant,
16 *Dexter Horton Bldg. Seattle.*

Indorsed: Bill of complaint. Filed in the U. S. circuit court dist. of Washington Oct. 31 1902 A. Reeves Ayres, clerk, H. M. Walthew, deputy.

9 In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

KATHERINE AUGUSTA McQUESTEN, Plaintiff,
vs.
NICHOLAS J. STEIGLEDER and CHRISTINA Steigleder, His Wife, Defendants. } No. 1046. Answer.

The joint and several answers of Nicholas J. Steigleder and Christina Steigleder, his wife, defendants, to the bill of complaint of Katherine Augusta McQuestion, plaintiff.

These defendants now and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can be or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering say:

I.

Defendants admit the allegations in paragraph I of said bill of complaint.

II.

Defendants admit that the plaintiff carried on business on her own account at Turner's Falls, Massachusetts, for — years, and that she is competent and able to carry on business on her own account, and that she is accustomed to act for herself and to rely on her own judgment, but they deny that the said Nicholas J. Steigleder ever urged her to close up her business in Massachusetts and invest in real estate in Seattle, Washington, or that he ever took advantage of his situation or relationship to her to make a secret profit out
10 of any investment that he made for her, and they further deny that she ever acted on his advice and representation, but aver that in all her dealings with him she acted wholly on her own judgment, after full knowledge of all the facts relating to such transactions as will hereinafter more fully appear.

III.

Defendants deny that the plaintiff forwarded to said Nicholas J. Steigleder $3,600 or any other sum to be invested by him in real estate in Seattle, as her agent and trustee, or that he ever invested any money in Seattle for her in real estate as her agent or trustee, (or that on the 21st day of January, 1902, he wrote her a letter urging her to send him money for that purpose,) but admits that she forwarded to him $3,600 for the reasons and for the uses and purposes hereinafter set forth.

IV.

Defendants deny that the defendant Nicholas J. Steigleder on or about the 14th day of March, 1902, purchased the real estate described in paragraph IV of said complaint as the agent and trustee of the plaintiff, and aver that they purchased said real estate on their own account, with their own means, and that the same became the community property of the defendants, and they deny that the plaintiff acquired any interest therein by reason of said purchase.

V.

Defendants deny that the alleged letter mentioned in paragraph V of said complaint, sets out truly and correctly either *in hæc verba* or in substance any letter written to the plaintiff by said Nicholas J. Steigleder on or about the 14th day of March, 1902, or at any other time, and the said Nicholas J. Steigleder avers that if
11 said alleged letter was set out correctly and in its entirety, it would be different from the pretended copy in said paragraph V of said complaint contained, that a number of letters passed between them; that he did not keep a copy of any of such letters, and does not recollect their contents, and that it is not within his power to set forth their contents; that in subsequent transactions between himself and the plaintiff the said letter was wholly disregarded by the plaintiff and received no consideration whatsoever from her, and never entered into their transactions nor became a part of the *res gesta* of such transactions, and the contents of such supposed letters whatever they may be are irrelevant and immaterial, and that she did not nor would not authorize or permit him to act as her trustee, and he was not so acting as will hereinafter more fully appear.

VI.

Defendants deny each and every other allegation contained in paragraphs 6 and VII of said complaint.

VII.

Defendants deny each and every allegation contained in paragraph VIII of said complaint, except the allegations therein contained relating to the conveyance of said premises. The defendants admit that they sold and conveyed to the plaintiff lot three and the north twenty feet of lot four of said premises, and that they still retain the remainder of said premises as their own property.

VIII.

Defendants deny each and every allegation contained in paragraphs 9, 10, XI and XII of said complaint as therein set forth, and aver that the same are misleading and based on undue assumption;

that plaintiff was not concerned in the said purchase of real estate; that the defendants made said purchase on their own account and not as trustee for plaintiff, and that all negotiations relating
12 to the mortgage of $4,000 occurred subsequent to said purchase, and that all the matters and things connected with the business transactions between the parties hereto were adjusted and settled by a subsequent accounting and agreement by and between the plaintiff and the said defendant Nicholas J. Steigleder.

IX.

Defendants further answering aver that in January 1901, the plaintiff then carrying on business on her own account in the State of Massachusetts, began to write letters, and since that time has from time to time written letters to Nicholas J. Steigleder, one of said defendants, and a brother of the plaintiff as stated in the complaint, and in which said letters she stated that her health was very poor, and that she must close her business and go to Germany for rest and recreation, and that 3½% and 4% per annum was the highest and best rate of interest that she could obtain in Massachusetts for certain money she had on hand, and that she was much surprised that anyone in Seattle, Washington, could afford to pay 7% per annum interest on money, and she desired and requested her said brother to take $3,600 and pay her 7% per annum interest thereon; and upon her departure for Germany she sent him the said sum of $3,600, and telling him not to forward his note for the money until her return from Germany, when all details of transactions would be settled; and the said Nicholas J. Steigleder accepted said money as a loan on the terms and at the rate of interest demanded by the plaintiff, and the plaintiff prior to sending said money to the said Nicholas J. Steigleder stated positively, and declared that she would not invest any money in Seattle real estate in Seattle, Washington; that she had no confidence in real estate as an investment, and that she would rather have 7% interest on her money than to have real estate; and that the defendants further answering aver that
13 the said Nicholas J. Steigleder became the debtor of the plaintiff to the amount of $3,600, together with accruing interest thereon, and was her debtor to that extent only at the time of said purchase, but did not become and was not her trustee or agent for any purpose whatsoever; that prior to on or about the 15th day of March, 1902, he began negotiations for the purchase of the said real estate; that the asking price therefor in the first instance was $10,000; that after long and tedious negotiations, and by the help and through the influence of a third party, the purchase was finally consummated on the basis of $8,000, exclusive of disbursements, and making no account of the time and labor required to consummate said purchase; that the said premises consisted of six houses each rented for the sum of $20 per month, and said purchase was a good bargain; that he offered to sell to the plaintiff four of said houses

for $6,000; that said four houses were bringing a monthly rental of $80, or a yearly rental of $960, which is 16% on the price asked, and the said Nicholas J. Steigleder represented to the plaintiff that it would be much better and more profitable for the plaintiff, and more agreeable to him, to purchase said four houses at the price asked her than to hold his note for $3,600 at 7% interest; that an accurate description of the said four houses *were* given to the plaintiff together with all the material facts, relating to said property, and that said facts were carefully and deliberately considered by her, and her decision to purchase said property was based upon the said facts, and not upon any advice which he gave her. He admits that he advised her to purchase the said four houses because it was to her interest to do so, but not until she had fully informed herself as to all the facts and figures respecting this particular piece of property, and until the same were fully understood by her, and carefully weighed, and the percentage of income
14 thereupon carefully and accurately computed by her was she convinced that real estate was a good investment, and her decision made to purchase the said four houses, and that ever since her purchase of said four houses she has collected $80 per month rent therefor, during the period from March, 1902, to October, 1902, and she has repeatedly expressed herself as being well satisfied and pleased with her bargain, and offered no objections to anything that the said Nicholas J. Steigleder had done, and during all this time she had full and accurate knowledge of all that he had done, respecting the purchase of the said six houses, and frequently stated that she approved the same and was grateful to him that he had secured so good an investment for her, and that in June, 1902, all matters of business and accounting between them were fully adjusted and settled upon terms suggested and proposed by her, and mutually agreed to by her and the defendant Nicholas J. Steigleder, with full knowledge of all the facts respecting said business transactions, and said final account and settlement has been acted upon and carried out by both of said parties thereto, and the bringing of this action is a matter of great surprise to the defendants and the defendants aver that undue influence has been brought to bear on the plaintiff, and that she has been wrongly advised and misled, and induced to bring this action through a misapprehension of the legal effect of her own acts.

Wherefore the defendants pray that the action may be dismissed and that the defendants may go hence without day and that they may recover their costs and disbursements herein.

JOHN R. PARKER,
Attorney for Defendants.

PARKER & SCHMIDT,
Of Counsel for Defendants.

15 STATE OF WASHINGTON, } ss:
County of King, }

Nicholas J. Steigleder, being first duly sworn on oath says: That he is one of the defendants in the above entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

NICHOLAS J. STEIGLEDER.

Subscribed and sworn to before me this 20th day of January, 1903.

JOHN R. PARKER,
Notary Public for the State of Washington,
Residing at Seattle.

Copy of within answer received and due service of same acknowledged this 21st day of January, 1903.

McKAY, CARKEEK & CHILDE,
Attorney- for Complainant.

Indorsed: Answer. Filed in the U. S. circuit court dist. of Washington Jan. 21 1903 A. Reeves Ayres, clerk, A. N. Moore, dep.

16 United States Circuit Court, District of Washington, Northern Division.

K. A. McQUESTEN, Complainant,
vs.
N. J. STEIGLEDER ET AL., Respondents. } No. 1046. Filed June 23, 1903.

Memorandum Decision on Defendants' Motion to Dismiss for Want of Jurisdiction.

The question which the court has now to decide is, whether the complainant can maintain her suit in this court as a citizen of the State of Massachusetts.

The bill of complaint contains proper and sufficient averments to authorize the bringing of the suit in this court on the ground that the complainant is a citizen of the State of Massachusetts and the defendants citizens of the State of Washington, and the averments of jurisdictional facts are not controverted by the answer or any special plea, therefore the court is warranted in taking cognizance of the case until it appears affirmatively that the complaint is not true in fact. The motion to dismiss is based upon an assumption that by the evidence is does appear affirmatively, that at the time of the commencement of the suit the complainant was not a citizen of the State of Massachusetts, because she had changed her residence from Massachusetts to the

State of Washington, and was then residing in the State of Washington. The evidence shows that at the time of commencing the
17 suit, and for about four months previous, she was and had been living in this State with her son, the two being the only members of the family. Jurisdiction, however, depends upon citizenship, and not upon the place of residence. It is true that by the 14th amendment to the Constitution citizens of the United States are also citizens of the State in which they reside, but it has been settled by numerous decisions that a mere temporary change of residence from one State to another does not work a change of citizenship. In order that a change of citizenship from one State to another should affect the right of bringing a suit in a Federal court, it must be made with a *bona fide* intention of becoming a citizen of the State to which the party removes. 6 Am. & Eng. Encyc. of L., 2nd ed., 32. The real question to be decided relates to the permanent domicil of the complainant rather than to the place of which she was an inhabitant at the time of commencing the suit. By the undisputed evidence it appears that she lived in the State of Massachusetts, and was permanently settled there, for a period of twenty years prior to the month of January, 1902, and at that time on account of failing health she disposed of a merchantile business which she had been carrying on, and went to Europe, then returned to Massachusetts, remained there a few days, and she then came to this State, bringing with her all of her personal effects, and took up her residence in a house which she owned. Her intention at the time of coming was to try the effect of a change of residence upon her impaired health, and she entertained hopes of finding here a favorable opportunity for her son to learn a trade, and also of deriving pleasure from a residence near to her brother and his family, but she had not previously visited this State, and did not know whether the change would be beneficial or agreeable, and her mind was unsettled as to whether she would remain perma-
18 nently or return to Massachusetts. In a short time after coming she found that she could derive no pleasure from living near her brother, and his family, and as her health was not improved she decided to return to Massachusetts and resume her residence there, among her friends and acquaintances. Under these circumstances, the court cannot find as a fact that the complainant has acquired a domicil in the State of Washington, nor that she lost her domicil in the State of Massachusetts. "A domicil once acquired is presumed to continue until it is shown to have been changed. Where a change of domicil is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicil two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicil for another.

Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject." Mitchell *v.* United States, 21 Wall., 353; 6 Am. & Eng. Encyc. of L., 2nd ed., 32; 10 Am. & Eng. Encyc. of L., 2nd ed., 7–16; *In re* Williams, 99 Fed. Rep., 544; Morris *v.* Gilmer, 129 U. S., 315.

I have not found in the evidence that the complainant was born in the United States, nor that she was naturalized or married to a citizen, but as the pleadings raise no issue with respect to her citizenship, the court will assume that she is a citizen of the United States until it is shown affirmatively otherwise.

Motion to dismiss denied.

C. H. HANFORD, *Judge.*

Indorsed: Memorandum decision on def'd'ts' motion to dismiss. Filed June 23 1903 A. Reeves Ayres, clerk, by A. N. Moore, deputy.

19 United States Circuit Court, District of Washington, Northern Division.

KATHERINE AUGUSTE MCQUESTEN, Complainant, vs. NICHOLAS J. STEIGLEDER ET UX., Defendants. } No. 1046. Filed Jan. 28, 1904.

Memorandum Decision on the Merits.

On the question as to the citizenship of the complainant, and the court's jurisdiction of this suit, I adhere to the decision heretofore rendered.

The material averments of the bill of complaint are in effect as follows: The complainant is a widow, and is a sister of the defendant Nicholas J. Steigleder. Previous to the year 1902, she carried on a mercantile business in the State of Massachusetts, and in January of that year, on account of failing health, she closed up her business, and after spending a few months in Europe came to Seattle. In the year 1901 she was persuaded by letters from her brother, one of the defendants, who was then and since a resident of Seattle, that money might be profitably invested in Seattle real estate, and relying upon offers contained in her brother's letters, and believing that he would make good use of her money for her benefit, she sent him $3,600 to be so invested. The letters referred to contained no suggestion of any thought in the mind of the defendant that he was to be compensated for his services in investing the complainant's money, or to make a profit out of such transactions, but were so phrased as to justify a belief in the mind of

the complainant that he was actuated entirely by fraternal
20 affection and solicitude for her welfare. On the 14th day of March, 1902, said defendant made a purchase of the real estate which is the subject of controversy in this suit, being 120 x 120 feet, covered by six tenement houses, for the price of eight thousand dollars, and took a conveyance of the property in his own name, and used in paying the $3600.00 which he had received from the complainant and four hundred dollars of his own money, and gave his note and a mortgage upon the entire property for the remaining part of the purchase money, to-wit: four thousand dollars. On the same day that said purchase was made, in a letter to the complainant the defendant represented that he had made a deal by which he had purchased for her four houses for the price of six thousand dollars, and that he had purchased the other two houses for three thousand dollars, and had given a mortgage for four thousand dollars of the purchase price, and that twenty-five hundred dollars would be required to make full payment for her portion of the property so purchased, the letter being so phrased as to convey the false information that the purchase price for the property was nine thousand dollars. instead of eight thousand dollars, and that the defendant had paid on account of said purchase price of his own money, fifteen hundred dollars, instead of only four hundred dollars. The complainant afterwards paid off the four thousand dollars, secured by mortgage, with accumulated interest, and she received from the defendants a deed by which they conveyed to her two-thirds of the premises, and she also received Steigleder's note for fifteen hundred dollars. The six houses upon the property are built together, so that it will be impossible to make a division of the ground and buildings in such a manner as to partition the property between the
parties, giving to the complainant a part thereof equal in
21 area and value to the amount of her money invested therein, and to the defendants a part equal in value to the four hundred dollars of their money so invested.

By the answer and in his testimony Steigleder denies that he received the complainant's money in trust to be invested for her, and denies that the premises in controversy or any part thereof was purchased for the complainant, and he asserts to the contrary that she refused to send money to be invested in Seattle real estate, that the $3600.00 was sent to him as a loan on interest at the rate of seven per cent. per annum, and that the defendants purchased the whole of the premises for their own use and benefit, and used only their own "means" in making said purchase. In all of these important particulars, his own letters and other convincing evidence prove conclusively that Steigleder is a mendacious witness, and I reject the whole of his testimony as being unworthy of credence.

I find from consideration of the evidence that the facts averred in the bill of complaint as above condensed and narrated have been proved by a fair preponderence of the evidence, and I am convinced that the complaint is in all material respects true. It is proved by in-

disputable evidence that eight thousand dollars was the price at which the property was first offered for sale to the defendant Steigleder by the agent of the vendor, and the actual price for which it was purchased. Said defendant makes the claim, however, that he paid a commission of one thousand dollars to an outside party for information by which he was assisted in discovering the agent with whom he dealt in making the purchase; that said commission of one thousand dollars was not paid in money but by a transfer of Steigleder's interest in some mining locations in Alaska, which were valuable, and worth more than said sum of one thousand
22 dollars. There is no apparent reason to justify the payment of a commission for such information. The agent with whom Steigleder dealt is a well known business man of this city, having a permanent office, and there was no difficulty in locating him. If Steigleder did in fact transfer mining property of any considerable value in lieu of a commission, his liberality was excessive, and he cannot in equity require the complainant to contribute any part of the value of his mining property disposed of in that manner. Steigleder's testimony on this branch of the case is clearly contradictory of the representations with respect to the transaction contained in his letter to the complainant, dated the day of the purchase. I believe the claim when advanced was entirely an after thought, and I reject it as being not proved by credible testimony.

The claim is also made in behalf of the defendants that only $3500.00 of the complainant's money was originally invested in the property, and that one hundred dollars was loaned without security other than the individual promissory note of the borrower, and a worthless certificate of mining stock as collateral, which note and collateral were accepted by the complainant. In his report to the complainant of the manner in which he had invested her money, in letters dated March 14th and April 14th, 1902, Steigleder did not intimate that he had loaned one hundred dollars of the complainant's money, nor mention it in a subsequent letter dated June 3rd. The note, instead of being an ordinary promissory note, is a nondescript agreement, dated May 28, 1902, by the terms of which the borrower was allowed to exercise an option to repay the one hundred dollars or forfeit the collateral. The complainant's name does not appear in the document, as a party to the transaction.

The contention of the defendants that the investment of the complainant's money in the manner it was made by her brother
23 and his division of the property were approved and ratified by the complainant, must be rejected, for the reason that it appears by a fair preponderance of the evidence that the complainant was not truly informed of the facts in regard to the transaction at the time of the supposed ratification, and she acted promptly in repudiating the arrangement when she learned the truth of the matter. When the complainant came to Seattle, she found the defendants occupying one of the tenement houses so purchased, as a dwelling, and she and her son for a time lived with them, but their

relations becoming unpleasant and strained the defendants moved out, leaving the complainant and her son in the occupancy of said house. After the separation of the two families, the complainant became for the first time apprised of the truth as to the real amount of the purchase price of said property, and afterwards returned or tendered to the defendant his promissory note for fifteen hundred dollars, and offered to pay him the four hundred dollars which he had invested in cash for the purchase of the property, and demanded a conveyance to her of the entire premises.

The property in controversy cost eight thousand dollars, of which amount the complainant paid seven thousand six hundred dollars, and she is equitably entitled to have the full benefit of the investment of that amount of her money, and as the property cannot be partitioned in proportion to the amounts contributed towards the purchase price, she is entitled to take the whole property by repaying to the defendants the four hundred dollars which they had put into it, and two hundred dollars paid to her on account of the fifteen hundred dollar note. The defendants have enjoyed the use of, and income from, two of the houses from the time of acquiring possession, which is shown by the evidence to be worth forty dollars per month, which the plaintiff is entitled to recover, less the
24 above mentioned six hundred dollars. I therefore direct that a decree be prepared for my signature, adjudging the complainant to be the owner of the entire property, and requiring the defendants to execute a conveyance thereof to the complainant, and in case of their failure to do so that all of their right, title and interest thereto be conveyed by Eben Smith, master in chancery, to be named in said decree as a commissioner specially appointed by the court to execute such conveyance, and that the complainant recover from the defendants also for the use and occupation of two houses at the rate of forty dollars per month from the 15th day of March, 1902, after deducting therefrom six hundred dollars, and costs. No interest will be allowed to either party.

C. H. HANFORD, *Judge.*

Indorsed: Memorandum decision on the merits. Filed in the U. S. circuit court dist. of Washington Jan. 28 1904. A. Reeves Ayres, clerk, H. M. Walthew, deputy.

25 In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

KATHERINE AUGUSTE MCQUESTEN, Plaintiff,
vs.
NICHOLAS J. STEIGLEDER and CHRISTINA STEIGLEDER, His Wife, Defendants. } No. 1046.

Decree.

This cause came on to be heard at the last term of this court on the plaintiff's bill of complaint, the answer of the defendants, the replication to said answer and the proofs, and was argued by counsel and taken under advisement by the court, and it appearing that the material facts charged in the plaintiff's bill of complaint, are true, and that the material allegations in the defendants' answer are untrue and that the defendants have since the 15th day of March, 1902, been in the possession of the premises in controversy and in receipt of the rents and profits therefrom, and that such rents and profits are worth the sum of forty (40) dollars per month, now therefore, on consideration of the matters aforesaid,

It is ordered adjudged and decreed as follows:

1. That the defendants release and convey to the plaintiff her heirs and assigns forever, the lands and premises in controversy in this action which lands and premises are described as follows: The south forty (40) feet of lot four (4) of D. T. Denny's Third Edition to North Seattle, according to the recorded plat thereof.

2. That the plaintiff have and recover from the defendants the rents and profits of said lands and premises at the rate of forty (40) dollars per month for twenty two and one half months, to
26 wit: the sum of nine hundred (900) dollars and that from the last mentioned sum there be deducted the sum of $400, paid by the defendants toward the purchase of said lands and premises, and the further sum of two hundred (200) dollars paid by the defendants to the plaintiff, making in all the sum of six hundred (600) dollars to be deducted from said sum of nine hundred (900) dollars, leaving a remainder of three hundred (300) dollars to be paid by the defendants to the plaintiff, for which last mentioned sum let an execution issue against the community, real and personal property of the defendants and the separate property of the defendant Nicholas J. Steigleder.

3. That the certificate of stock now among the proofs in this action and the note of the defendant for $1500, also in the proofs in this action, be delivered up by the clerk of this court to the defendant Nicholas J. Steigleder on his execution therefor.

4. That the defendants on demand execute and deliver to the plaintiff a release of all the right, title and interest which they had or held in and to the said lands and premises at the time of the com-

mencement of this action, and in default of the execution of such release and conveyance that such release and conveyance be executed on behalf of said defendants by a commissioner according to the statute in such case made and provided and Eben Smith is hereby appointed such commissioner to make, execute and acknowledge such release and conveyance for and on behalf of the said defendants.

5. That the defendants and all persons claiming the said lands and premises or the possession thereof through or under the defendants or either of them, surrender and yield up to the plaintiff the possession of the said lands and premises on the production of a copy of this decree and that the plaintiff be at liberty to
27 apply to this court for a writ of assistance to put her in possession of said lands and premises, if the same are withheld from her by the defendants or any other person in possession under the defendants or either of them.

6. That the plaintiff's title to the said lands and premises be forever quieted as against any claim of the said defendants or either of them or any person claiming title through or under the defendants or either of them since the commencement of this action, and that the said defendants and all persons claiming any right in said lands and premises under the said defendants or either of them since the commencement of this action be and they are hereby forever enjoined and restrained from asserting any right or title to the said lands and premises and from entering thereon and from interfering with the plaintiff's use, enjoyment or possession thereof.

7. That the plaintiff recover from the defendants her costs and disbursements to be taxed and that she have execution thereof.

Done in open court this 4th day of February, 1904.

C. H. HANFORD, *Judge.*

Indorsed: Decree. Filed in the U. S. circuit court dist of Washington Feb. 4 1904 A. Reeves Ayres, clerk, H. M. Walthew, deputy.

28 In the Circuit Court of the United States for the District of Washington, Northern Division.

KATHERINE AUGUSTE MCQUESTKN, Plaintiff, *vs.* NICHOLAS J. STEIGLEDER and CHRISTINA Steigleder, His Wife, Defendants.	In Equity. No. 1046. Certified Question on Appeal.

I, C. H. Hanford, United States circuit judge, by whom the decree herein was signed, do now, on this March 7, *29th*, 1904, being the December 1903 term at which the decree was signed, and entered certify as follows:

Katherine Auguste McQuesten in her bill of complaint states:

"To the judges of the circuit court of the United States for the district of Washington, northern division:

Katherine Auguste McQuesten, a citizen of the United States and of the State of Massachusetts, and residing at Turner's Falls, in said State, brings this, her bill of complaint against Nicholas J. Steigleder and Christina Steigleder, his wife, citizens of the State of Washington, and residing in the city of Seattle, in said State, and thereupon your oratrix complains and alleges: I." And then alleges that defendants are husband and wife, and that complainant "is a widow and the sister of the defendant Nicholas J.; that for many years prior to the 5th day of January, 1902, she had been in business at Turner's Falls, Massachusetts, on her own account."

Then by appropriate allegations plaintiff sought to hold defendants as trustees, holding for her in trust certain real property in King county, Washington, described as the south forty (40) feet of lot four (4), block thirty-seven (37) of D. T. Denny's 3rd addition to North Seattle, according to the plat thereof. Defendants demurred to said bill for want of equity, which demurrer was, after argument, overruled; defendants were given leave to and answered said bill, denying said trust and averring that all matters of business and accounting between said plaintiff and said defendants were fully adjusted and settled, and that said final settlement had been acted upon and carried out by said parties. Reference is had to the bill of complaint and answer herein for a more specific statement.

29

That thereafter said cause was referred to a master to take testimony thereon, and after said testimony was taken defendants' attorneys moved the court as follows, to-wit:

"I.

"That the above entitled action be dismissed for want of jurisdiction of this honorable court.

II.

For damages and solicitor's fees.

That for grounds in support of said motion, defendants show:

I.

That the complainant is a resident of this State, and has been a resident of this State long prior to the commencement of this action, to-wit: since June 1902, and that the defendants are also residents of this State, as will more fully appear by reference to the evidence filed herein.

II.

That complainant unnecessarily consumed a large amount of time in taking evidence before the master in chancery herein, to-wit: for five days, when one or two days would have been ample to have taken all testimony on behalf of complainant, all of which will more fully appear by reference to the testimony filed herein.

PARKER & SCHMIDT,
Attorneys for Defendants."

And thereafter and on June 23rd, 1903 this court filed a memorandum of decision denying defendants' motion to dismiss for want of jurisdiction.

Now therefore, I do certify to the supreme court the sole question of the jurisdiction of this court in said cause, to-wit: Did the court err in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction?

I further certify that there is sent a true copy of so much of the record as is necessary for the determination of the question of
30 jurisdiction, and that said record, exclusive of the pleadings, motion to dismiss, decision thereon, and final decree, is as follows:

31 *Testimony of Complainant.*

(Mr. McKAY:)

Q. Mrs. McQuesten what is your age?
A. 54.
Q. What is your business?
A. Dry and fancy goods, it was, but not now.
Q. Are you related to Nicholas J. Steigleder, one of the defendants?
A. I am his sister.
Q. Do you know when the defendant Nicholas J. Steigleder first came to Seattle, state proximately?
A. I should think about nine years ago.
* * *
Q. (The witness is shown Complainant's Exhibit "C") Your attention, Mrs. McQuesten, is called to the first two lines of that letter, previous to the receipt of that letter, Mrs. McQuesten, had you ever sent Mr. Steigleder, your brother, any money?
A. I sent him $3600.00 to invest.
Q. And how did you send it to him?
A. By draft.
Q. Now for what purpose did you send him the money?
A. The money was sent for investment.
Q. In what kind of property?
A. In real estate.

Q. Where?
A. In Seattle.
Q. Now Mrs. McQuesten at the time these letters were sent to you and at the time you sent the money where were you living?
A. In Turner's Falls, Massachusetts.
Q. Now where was your brother living?
A. In Seattle.
Q. Now before coming to this State where did you go after
32 leaving Turner's Falls?
A. I went to Germany for my health.
Q. How long were you in Germany?
A. Three months.
Q. Now when did you first see the property which Mr. Steigleder had purchased in North Seattle?
A. The 22nd of June, 1902.
Q. Was that when you first came here?
A. Yes.

Cross-examination.

(Mr. PARKER:)

Q. What business are you carrying on now Mrs. McQuesten?
A. I do not have any business just now.
Q. How long since you were carrying on any business?
A. I sold out the first of June, 1902.
Q. Where was your business that you sold out?
A. In Turner's Falls, Massachusetts.
Q. Have you any business in Turner's Falls, Massachusetts, now?
A. I have no business except bills to collect.
Q. Any property in Turner's Falls, Massachusetts?
A. No, no property in Turner's Falls.
Q. Don't you own any real estate there at all?
A. I never did.
Q. Any personal property except some bills?
A. Not at present.
Q. When did you go away from Turner's Falls, Massachusetts?
A. I left Turner's Falls to come here June 16th, 1902.
Q. What did you do after you sold your business in Massachusetts?
A. Well I went away then.
Q. When did you leave Turner's Falls to go to Germany?
A. The 15th of February.
Q. Then where did you go to from Germany, after you left Germany where did you go?
33 A. I came to Turner's Falls.
Q. How long were you in Turner's Falls after you came from Germany?
A. About 12 days.
Q. Then where did you go from Turner's Falls?

A. I came here.
Q. How long have you been here?
A. I am here since June 22nd.
Q. Are you keeping house?
A. No.
Q. Have you a family?
A. My son.
Q. Your family consists of yourself and your son?
A. Yes.
Q. Have you no other family?
A. No.
Q. Have you no husband?
A. No.
Q. Is your son in business here?
A. Not at present.
Q. He resides with you?
A. Yes.
Q. Where do you live in Seattle?
A. 223 2nd avenue.
Q. One of these houses in question?
A. Yes.
Q. How long have you lived there?
A. Since I am here—since June 22nd.
Q. How long do you expect to live there?
A. My staying here is very uncertain on account of my health. I do not feel good.
Q. Then you went to the house of your brother on the 22d of June & you boarded with him for how long?
A. Until October the 8th.
34 Q. You looked over the six houses, he (defendant Nicholas J.) showed them to you did he not?
A. Yes I seen them.
Q. And he was living in one of them?
A. Yes.
Q. You moved into one of those four houses, did you not?
A. Well we stayed in that house and my brother moved.
Q. It was in one of your houses then you were living?
A. Yes.
Q. Your brother moved out?
A. Yes.
Q. And you remained in possession?
A. Yes.
Q. And you had been living there ever since?
A. Yes.
Q. Keeping house there?
A. Yes.
Q. You and your son?
A. Yes.

Q. And you have been collecting rent of the other three houses?
A. Yes.
Q. You have been getting then sixty dollars for the three houses you do not occupy?
A. Yes.
Q. And you have a good title to those four houses?
A. I have not papers—no title.
Q. You have to the four houses?
A. I have the deed that's all.

* * *

Q. You have had possession of them since June?
A. Since the last part of June.

* * *

35 Q. You had a family quarrel?
A. Well, did not have much of a quarrel because I am a person that don't speak very much.
Q. And they went out of the house, that is, Steigleders went out of the house?
A. Yes.
Q. And you stayed in?
A. Yes. It was arranged. There were some tenents moving and I wanted to take the house and I preferred to stay in that house.

* * *

Q. And this investment here in Seattle is the first investment in real estate that you ever made is it not?
A. Yes sir.
Q. Now you collected rents for these houses since March last?
A. Yes sir.

* * *

Q. Now Mrs. McQuesten did your brother ever write you or urge you to send money here to buy real estate with?
A. He urged me to come to live here, yes. I refused in October to come and he urged me to come after that.

Testimony of Defendant Nicholas J. Steigleder.

(By Mr. PARKER:)

Q. I will ask you whether or not you have ever carried on a correspondenoe with the plaintiff?
A. Yes, I have.
Q. Have you looked at these papers marked for identification, Defendants' Exhibits Number One, Two and Three, and state in whose handwriting they are?
A. They are Mrs. McQuesten's.
Q. Who did she mean by "Dear Joe"?

A. She means me.
Q. What is meant by "Katie"?
A. She means herself.

* * *

36 Q. Was Mrs. McQuesten, the plaintiff in this case in Turner's Falls, Massachusetts?
A. Yes sir.
Q. Do you know how long she was in business there?
A. Yes sir, since 1882 or '83.
Q. During the time she was in business there did you correspond with her regularly?
A. Yes sir.
Q. State, if you know, whether or not she closed up her business there in Massachusetts.
A. Yes sir, she sold that business in January, I think.
Q. Did she or did she not entirely close out her business there?
A. From what I know she wrote me that she sold everything.
* * *
Q. When did Mrs. McQuesten come to Seattle to live?
A. She came here in June—last June, 1902.
Q. Did she or did she not bring her household goods with her?
A. Yes sir, she brought them here.
Q. State whether you know or not that she has any other goods or personal property or real estate in Massachusetts.
A. No, she has not.
Q. State whether or not she has kept house here.
A. She does keep house here.
Q. Who with?
A. Her son.
Q. Do you know whether or not she came here to live?
A. Yes sir.
Q. Do you know if she has abandoned her residence in Massachusetts?
A. I know she has.
Q. Where did she reside now, what number of street?
A. In 223 Second avenue north in Seattle.
Q. In Seattle, Washington?
37 A. Yes sir.
Q. Who lives with her?
A. Her son.
Q. How old is he?
A. About 18.
Q. Is she a divorced woman?
A. Yes sir, divorced, at Greenfield, Mass. sometime in 1892.
Q. State whether or not she has sent or written anything to you with reference to obtaining a situation in business for her son in Seattle.

A. Yes sir, she wrote once that he would find—she would like to have him do something in the electrical business here.

Q. Did she write this?

A. Yes sir, she wrote that.

Q. State who she wrote that to—is that all she wrote about that?

A. She wanted to know whether there was any occasion for him to work in the same line as he was in Germany engaged, and I wrote to her that there were some pretty large plants here and that I thought he could get employment here. When he came here I went with him to some of these firms, the Seattle Electric Company and also Clarke's on Second avenue, and I got him a position at the last place. He worked there for some time.

Q. Is he in business here now?

A. I suppose so, I could not tell.

Q. I will ask you whether or not Mrs. McQuesten is living in one of these houses that is in question here?

A. Yes sir, she does.

Q. State if you have heard Mrs. McQuesten say anything about the climate of Massachusetts.

A. Why she was sick for several years and was under treatment of several doctors, and I wrote to her once that I thought the climate here would be very good for her, for her health and might be
38 to her advantage if she would move here. I also suggested to her once, when she complained that business was pretty hard on her, that she might just as well sell out and come here to live. That she could just as well give up business and take a rest. She mentioned in connection with this that if she would sell she would lose her income from the business.

Q. Well, confine your statement now to what was said about her residence here, what she wrote with reference to moving here and living here. That is what I want to bring out now.

A. Well, she wrote me once that she would come out here to live, but first she would go to Germany to visit her son and bring him back in the fall, probably in September, and I should look up a house for her, some rooms, so it would be all provided when she came here.

Q. Do you know whether or not she ever intended to go back to Massachusetts again?

A. She never said so.

Q. Did she ever say anything about it, if you recollect?

A. No she did not say anything.

Q. I will ask you to state when these letters were destroyed which you received from her, whether it was before or after this suit was commenced?

A. It was before this suit was commenced.

Testimony of Elizabeth Bamburger.

Q. Do you know Mrs. McQuesten, the plaintiff in this case?
A. Yes sir.
* * *
Q. Do you or do you not know that she was in business in Turner's Falls, Massachusetts?
A. Yes sir, I do know.
Q. Do you or do you not know she has closed out her business there?
A. I heard that she had sold out.
Q. Well, did she ever say anything to you about it?
39 A. Yes sir.
Q. That she had closed out her business there?
A. Yes sir.
Q. Did she ever say anything to you about coming to Seattle to live?
A. After she was here we spoke to-gether, yes, but not before.
Q. What did she say to you about it?
A. Well, she wanted to stay here with her brother Joe and they wanted to be united together and she thought it was all right.
Q. Did you ever hear her say whether or not she intended to make this her home, her residence?
A. To make Seattle her home, so much as I understood.
Q. Is she or is she not keeping house in Seattle?
A. She is keeping house.

Complainant called in rebuttal, testified.

(Mr. McKAY:)

Q. Before coming to this State, Mrs. McQuesten, where did you live?
A. I lived at Turner's Falls, Mass.
Q. For how long a time had you lived at Turner's Falls?
A. I lived in Turner's Falls about 20 years.
Q. When did you come to this State?
A. We came in June, 1902.
Q. When you came here, Mrs. McQuesten, what was your purpose or intention as to residence or staying here?
A. I came here on the representation of these letters in re-
40 gard to my health, one thing; having my boy learn his trade, and to live with my relatives, if we could possibly get along and if it all was agreeable, I should stay, otherwise I should not, that was my intention.
Q. Have you at any time any intention—any fixed intention, to remain here?
A. If everything had been agreeable, and if everything would

have been in my favor I didn't know as what I would have stayed; otherwise I felt that I was not obliged to stay unless I liked——

Q. Now what is your present intention as to staying here or going away?

A. My present intention is not to stay here but to go back to my old home, for how long I could not say, but I thought I would go back to look after my accounts and have my friends there. How long I cannot say.

Cross-examination.

(Mr. PARKER:)

Q. Mrs. McQuesten, one of your objects in coming here was to get a situation for your son, was it not?

A. Yes I thought he could learn his trade here.

Q. He did get a situation here for a while?

A. Yes he got a situation but it was nothing to learn there.

Q. And it was also your desire to be near your friends and relatives?

A. Yes it was my desire, but it was not agreeable to be near them.

Q. You came here and stayed a while and found it was not agreeable, but your idea in coming here, if I understand you directly, was first to get a situation for your son——

A. First, my health was No. 1——

The MASTER: Wait until the question is completed.

Q. (Continuing:) second to be near your friends, and third
41 your health? Those were the motives which induced you to come to Seattle?

A. Yes, I guess so. I had never been in Seattle, I didn't know what it was, I came in response to these letters.

WALTER F. MCQUESTEN called in rebuttal testified:

Q. Mr. McQuesten state your full name, age and residence.

A. My name is Walter F. McQuesten, 45 years old the 7th of September this year.

Q. What is your residence?

A. 225 Torry avenue north, Seattle.

Q. Are you acquainted with Katherine Auguste McQuesten, the plaintiff in this action?

A. Yes sir.

* * *

Q. Where did you know her first?

A. Turner's Falls, Massachusetts.

Q. Of what race is she?

A. German, I understood always—I always understood that.

The MASTER: Speak a little louder please.

A. I said I supposed she was German—I always supposed that.
Q. Where were you born?
A. At Litchfield, New Hampshire.
Q. Where was your father born?
A. Same place; same farm.
Q. Were you ever married to the complainant in this action?
A. Yes sir.
Q. When and where?
A. The 19th day of September, 1882, at Turner's Falls, Massachusetts.

ELMIRA S. MCQUESTEN called in rebuttal testified:

Q. Are you acquainted with Walter F. McQuesten?
A. I think I am. I ought to know him.
42 Q. What relation is he to you?
A. My oldest son.

* * *

Q. Where were you born?
A. I was born in the State of Vermont,—Weathersfield, Windsor county.

That complainant introduced in evidence the following exhibits, to-wit: "E," "U," "C," "L" and "M;" and that defendants introduced in evidence the following exhibits, to-wit: "2" and "3;" said exhibits following in keeping with their dates.

43 COMPLAINANT'S EX. E.

SEATTLE, WASH., *Dec.* 18, 1901.

DEAR SISTER KATHIE: Your letters received and I will say in answer, that I took from your first telegram that you would prefer to have me make arrangements for the monthly notes and so I arranged it. Now I took hold of this matterss last Thursday and had a draft on the Croker bank for $500 deposited here with the Puget Sound national bank, with Croker's bank telegram as endorsement, to secure my notes here which are to bear interest at 6 per c./. If you like you can have these notes taken up by discounting them, and then you would draw the money and interests for it; or by taking ½ interest leave the money stand and have ½ of the net proceeds as soon as the whole of it is paid off, which is $1600.00 more.

I think that proposition of ⅔ on your stock etc. should be all right; it is very seldom that you can get a better offer later on, and a standing rule is to accept the first reasonable offer made. As I understand by a cash payment of 2000 dollars they will have to give notes for the balance and the bank then will accept from you for cash less dis-

count; then you will have all the money you can expect and turn to another investment, which will bring you good interests. So I would accept that offer if I was you and come away from there. I am very glad to know that you will come to live here with us and have Albert to join. I have no doubt that after you are out of that business turmoil you will feel a great deal better.

I am rather busy now and must close, wishing you a merry Christmas and happy New Year I am,

Your affect. brother, JOE.

Pastor Knappe and I are considering the publication of a monthly magazine in German for the whole U. S., his ideas to make this a good paying property are very good and I will see him occa-
44 sionally to arrange it as soon as possible. I will go to the bank and arrange about those notes. I did not want to act till I had a letter from you, so as to know what to do about it.

Exhibit E —— —— United States master in chancery. District of Washington, northern division. # 1046 Filed in the U. S. circuit court, dist. of Washington, Jun- 3, 1903. A. Reeves Ayres, clerk. A. N. Moore, deputy.

45 COMPLAINANT'S EX. U.

SEATTLE, WASH., *Jan.* 21, 1902.

DEAR KATHIE: When I came home last night I found your letter and was glad to hear you are well. If you go abroad you perhaps will stay all summer and come here in the fall, at any rate I should be glad to see you locate here, because I know it will benefit you very much. People sleep here too long I think, and I have no doubt you will find a great deal in that whenever you come. I am sure Albert will like it when he comes here, and he will find easily something to his liking.

In regard to an investment there is this one thing to be said that at present there is no other place in the United States with a better show of profitable investment than right here. Money brings high interest in buildings, there were over 5200 buildings put up last year and yet can't find vacant houses or rooms, and the rent is pretty steep. Now I am well acquainted with the German American Investment Company, of which Mr. Buttner a German advocate is the head. He has an adv. always in my paper and I cut one out of last week to let you see for yourself. This morning I asked him about it and he showed me a photo of the house, it is perfectly new and the $600.00 would be all right. But said he, what is the use to loan on mortgage; there is a fine house on 11th Ave. which the man wants to sell for $1600.00 and which will easily bring $25 rent per month, which is 18% per year on the investment, there are a

great number of chances like this and I would certainly advise you to invest where you get high interest, and you can live on your income and rest from your work. Now there are more chances, and if you would want to invest a larger amount of course you could, or even better, and get easily 10% all around. Now if you would like to you could deposit that money in the bank and have them telegraph to the Puget Sound national bank here the fact, with
46 the understanding that whenever any papers, either deeds or mortgages, are deposited here with them to *your* name only, to pay out the money. Or if you have confidence in me for that much, you can save the bank charges by sending me the draft and I would have the papers drawn up by Mr. Buttner, and send them on to you. Now while I am waiting for your answer I can make inquiries and will find something that will, to my best knowledge, be the best investment. Business property pays big rent here, and I only wished you could come here yourself very soon and look over the ground.

In regard to your piano, you should also make an arrangement how to send it whereever you want it, and have somebody to pack it for you, and have it arranged so that it will be shipped together and everything must be boxed and crated. Of course nice furniture like that has more value than you can get for it in selling, and you might as well ship it. I should be glad to see you here one of these days, and only hope to God that nothing prevents you when you are ready to come.

Mrs. Bamberger seems to look much better all ready, and she seems so pleased to be with her own folks once more. Her fellow passengers on the train *very very* attentive to her on the journey, and took the best care of her. They say that only her will and desire to see her daughter again kept her alive. She was terribly run down but she sleeps now like a log and eats with a good appetite, so in course of time she will be well enough to enjoy a few more years of happiness. I am surprised at poor Charlie's bad luck, what is he doing and where does he live. Let me know so I can write to him. Let me also know, if you know, Bastian's address.

Now I am so glad you can take a rest and your health will surely improve. Only I am afraid your going abroad will bring more uneasiness and restlessness than is good for you. Could not Bertie come over alone, he is old enough, but then you know that best.

Yes that was a terrible affair with Bitzer, seems to me the
47 shooting of that girl was no accident. People do get crazy like that once in a while. Will he have to stand trial.

Well I must close, with my best love,

I am your affect. brother, JOE.

Pl'ff's Ident. U. Filed in the U. S. circuit court, dist. of Washington, Jun- 3, 1903. A. Reeves Ayres, clerk. A. N. Moore, deputy.

48 DEFENDANTS' EX. 2.

TURNER'S FALLS, MASS., *Feb.* 7, 1902.

DEAR JOE: Just a few lines to say I have arranged things so I leave Saturday Febr. 15 for N. Y. I expect Georg- will meet me and assist me, I think I have told you before, I have felt pretty good, have slept some hours every night and hope to improve after this week.

I think I have told you I expect to leave on the steamer Kaiser Wilhelm Der Grouse on Febr. 18, 10 a. m. pier 52 N. Y. think of me will you, I will write as soon as possible. I hope you do well with what I have sent you, be careful, that you are without my telling you.

I have sold all I want to sell to a second hand dealer, who will take the things away after I am gone, I could not stand a private nor an auction sale I am sure.

I have a hard task before me, the packing I hope to get along all right, I shall miss my home very much, almost 18 years have I been in here and I am much attached to the house. I hope Joe that you will take a house in a quiet neighborhood when we come next fall. Hope all will go well, trusting in God for the future.

And now good bye all, m*ya* we meet again in the time appointed. Send a paper to Mr. Lucas March, Turner's Falls, Mass. We spoke about it to-day, I took dinner with them. Mrs. Shulz was here this week from Springfield, she took home the last one you sent. Give my regards to Mrs. Baumberger, and I bring my letter to a close with love to Tina and Walter, not forgetting your dear self.

KATIE.

Ident. 2. #1046. Def'ts' Exhibit 2. Eben Smith. United States master in chancery. District of Washington, northern division. Filed in the U. S. circuit court, dist. of Washington. Jun- 3 1903. A. Reeves Ayres, clerk. A. N. Moore, deputy.

49 COMPLAINANT'S EX. C.

SEATTLE, WASH., *Febr.* 28, 1902.

MY DEAR SISTER KATHIE: Your letter and postal received. Your draft came also to hand, and I have a number of houses offered me, of which I will make a selection. If possible I will take one that is sure to improve in value in course of time. There are quite a number of flat buildings that look good to me, but they are asking too high prices. Yet when I hit on something I will close the deal. Now I will say, there are some that may cost $4500 or $5000, and it would be just as well to take one of this kind and make a partial

payment, and have a mortgage. The interest would be 6 per cent, but as can easily get 10 to 12% it pays to do so. And if you want to use some of your money that you only get 4% for you make even more. I will try to do the best in your interest, so when you come here in the fall, you have an income, and can live without any trouble. I am very glad to know that you are coming and bring Albert, for this is a growing country with plenty of opportunities for young fellows. I hope you found him in good health and spirits, and wish you will enjoy your trip and come back in perfect health. I am very much hurried, working hard to save help, because I must get along or go down for good.

Hope to hear from you soon, and I am also glad you saw Bastian. With love from us all.

Your brother, N. JOE.

#1046 Exhibit C —— —— United States master in chancery district of Washington, northern division. Filed in the U.S. circuit court, dist. of Washington, Jun- 3, 1903. A. Reeves Ayres, clerk. A. N. Moore, deputy.

50 DEF'TS' EX. 3.

ELBERFELD, *May* 20, 1902.

DEAR JOE: I was rather waiting for another letter before we leave the country but up to now I have learned nothing. We are going to leave Elberfeld tomorrow for Rotterdam, look up the Ryndam in the paper. I received your last letter before we went to Frankenthal, it was rather short and I thought you are rather busy.

In regard to our future home I would say, that of course a seven room house is not large enough for us all, your mother-in-law now being with you, and I thought Joe to tell you that we probably need one of the houses the one closest to you, for ourself, that is more than we need, but I cannot do without several rooms, and I thought you might take care that it would be vacated, we can talk the rest over, that is so my idea I have had some experience since I am away from my own rooms, I miss so much to be quiet and alone once in a while. Behrends have been very kind to me so far as they knew how, but we are used to different. We found many of your papers in Elberfeld, we had to pay more postage, not anywhere else. I will tell you all about Frankenthal, you wouldn't like there now, neither do I, no place for us now, they all wish to be remembered to you. I feel pretty good but not much sleep yet, I wish the journey were behind me I am not fond to be on the train so long, but perhaps it is smooth and I won't mind the trains here at least, some they throw one from one side to another quite sea sickening, but to my comfort a Jabaurer told us yesterday he came from San Francisco, 5 days in the train, had no sleeper, and the train went very smooth, he is quite short and could just sleep on the seat but we are tall and cannot do so.

I have asked you to send particulars about our food and I quite expected to hear all about it.

And now I think I must close, I may hear from you at
51 Turner's Falls, where we expect to be soon.

Albert looks ahead with great expectations to the journey as well as to his new home, he is out at present to get some things, and I hasten to mail this.

Hoping to see you all in a short time,

I am as ever,

Your affect. sister, KATIE.

(Endorsed:) "# 1046. Filed in the U. S. circuit court, dist. of Washington, Jun- 3, 1903. A. Reeves Ayres, clerk. A. N. Moore, deputy."

52 COMPLAINANT'S EX. L.

$1500.00. SEATTLE, *March 15th*, 1902.

Five years after date, without grace, I promise to pay to the order of Mrs. K. A. McQuesten fifteen hundred dollars in gold coin of the United States of America, of the present standard value, with interest thereon, in like gold coin, at the rate of 5 per cent. per annum from date until paid, for value received. Interest to be paid annually, and if not so paid the whole sum of both principal and interest to become immediately due and collectable, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, I promise and agree to pay, in addition to the costs and disbursements provided by statute, fifty dollars in like gold coin, for attorney's fees in said suit or action.

Due March 15th, 1907.

NICHOLAS J. STEIGLEDER.

53 COMPLAINANT'S EX. M.

This memorandum of agreement, between N. J. Steigleder, of Seattle, King county State of Washington, party of the first part, and Mrs. K. A. McQuesten, of same place, party of the second part, witnesseth:

In consideration of the payment of fifteen hundred dollars ($1500) by the party of the second part to the party of the first part towards the purchasing price of the house and lot known as 215 Second avenue north in the city of Seattle, for which the party of the first part gave a note of this amount, dated ——, 1902, it is hereby agreed that the party of the first part pay to the party of the second part the sum of fifteen hundred dollars in part payments of one hundred (100) dollars each, until this full amount is reached, also

interest at five per cent. per annum for any amount remaining unpaid.

This agreement is made as security for the note given to party of the second part with the stipulation that the said house and lot be not sold unless said note is paid in full or payment is guaranteed.

This agreement to be in full force as long as said note is not so paid, but to become invalid just as soon as the same has been paid and surrendered, after all the payments have been made and receipts be shown.

Made this the fifteenth day of October one thousand nine hundred and two.

Witness our hands and seals.

Party of the first part —— ——.
Party of the second part —— ——.

M. for inden. —— Exhibit —— M. —— —— United States master in chancery. District of Washington, northern division. # 1046 #. Filed in the U. S. circuit court, dist. of Washington, Jun 3, 1903. A. Reeves Ayres, clerk. A. N. Moore, deputy.

54 In witness whereof I, the undersigned, judge of the circuit court of the United States, for the State of Washington, northern division, have hereunto set my hand this March 7, 1904.

C. H. HANFORD, *Judge.*

Indorsed: Certified question on appeal. Filed in the U. S. circuit court, dist. of Washington, Mar. 7, 1904. A. Reeves Ayres, clerk, H. M. Walthew, deputy.

55 In the Circuit Court of the United States for the District of Washington, Northern Division.

KATHERINE AUGUSTE MCQUESTEN, Plaintiff,
vs.
NICHOLAS J. STEIGLEDER and CHRISTINA STEIGLEDER, His Wife, Defendants.
} In Equity. No. 1046.

Appeal and Order Allowing Appeal.

The above named defendants, Nicholas J. Steigleder and Christina Steigleder, considering themselves aggrieved by the decision herein, and all of it, dated February 4, 1904, do hereby appeal therefrom and from each and all of it to the Supreme Court of the United States, and pray that this appeal may be allowed, and that the question of jurisdiction be certified to the Supreme Court, and that all proceedings be stayed pending said appeal; and that so much of the transcript of the record, proceedings and papers upon which said decree was made as is necessary for the determination of the

question of jurisdiction, and which are more fully set forth in the assignment of error herein, duly authenticated, may be sent to the Supreme Court of the United States.

Dated March 7, 1904.

EMBREE & COLE,
Attorneys for Defendants, 415 *Pioneer Building*,
Seattle, Washington.

56 On this March 7, 1904, it is ordered that an appeal be allowed as prayed for and that pending said appeal the bond heretofore given and dated February 23, 1904, by said defendants, be and act as a supersedeas bond, and also as a bond for costs and damages on appeal and that all proceedings in said cause be stayed.

C. H. HANFORD, *Judge.*

Indorsed: Appeal & order allowing appeal. Filed in the U. S. circuit court dist. of Washington, Mar. 7, 1904. A. Reeves Ayres, clerk, H. M. Walthew, deputy.

57 In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

KATHERINE AUGUSTE MCQUESTEN, Plaintiff,
vs.
NICHOLAS J. STEIGLEDER and CHRISTINA Steigleder, His Wife, Defendants.
} No. 1046. Assignment of Error.

The above named defendants, Nicholas J. Steigleder and Christina Steigleder, come now and say that in the record and proceedings in the above entitled cause, and in the decree dated February 4th, 1904, there is manifest error, to-wit:

I.

The court erred in taking jurisdiction of the bill of complaint and of the person of plaintiff herein, and also on June 10th, 1903, in denying defendants' motion to dismiss herein for want of jurisdiction.

II.

The court erred in entering a decree on February 4th, 1904, against defendants Steigleder and in favor of the plaintiff, said court having jurisdiction neither of plaintiff nor said cause.

Wherefore defendants pray that this, their assignment of error, be entered of record, and that upon the hearing of this appeal it be adjudged by the United States Supreme Court that the decree herein be reversed in all things, and that it be decreed that said United

States circuit court had no jurisdiction either of the person of the plaintiff or of said cause.

Dated March 7, 1904.

NICHOLAS J. STEIGLEDER AND
CHRISTINA STEIGLEDER,
By EMBREE & COLE, *Their Attorneys.*

Indorsed: Assignment of error. Filed in the U. S. circuit court dist. of Washington Mar. 7 1904 A. Reeves Ayres, clerk, H. M. Walthew, deputy.

58 In the Circuit Court of the United States for the District of Washington, Northern Division.

KATHERINE AUGUSTE MCQUESTEN, Complainant and Appellee, *vs.* NICHOLAS J. STEIGLEDER and CHRISTINA Steigleder, His Wife, Defendants and Appellants.	In Equity. No. 1046. Bond.

Know all men by these presents: that we, Nicholas J. Steigleder and Christina Steigleder, his wife, of King county, Washington, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto the said appellee, Katherine Auguste McQuesten, her administrators, executors and assigns, in the sum of one thousand two hundred dollars ($1,200.00) gold coin of the United States, to be paid to the aforesaid appellee, her administrators, executors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this February 23rd, 1904.

Whereas the above named defendants have appealed to the Supreme Court of the United States to reverse the decree in the above suit by the circuit court of the United States for the district of Washington, northern division,—

59 Now, therefore, the conditions of this obligation are such that if the above named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea and appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

N. J. STEIGLEDER,
MRS. CHRISTINA STEIGLEDER,
Appellants.

[Seal Am. Surety Co.]

AMERICAN SURETY COMPANY OF NEW YORK.
E. W. ANDREWS, *Resident Vice President.*
LIVINGSTON B. STEDMAN,
Resident Assistant Secretary.

The within bond is approved by me this March 7th, 1904.

C. H. HANFORD, *Judge.*

Indorsed: Bond on appeal and supersedeas. Filed in the U. S. circuit court dist. of Washington Mar. 7 1904 A. Reeves Ayres, clerk, H. M. Walthew, deputy.

60 In the Circuit Court of the United States, Distaict of Washington, Northern Division.

KATHERINE AUGUSTE MCQUESTEN, Plaintiff,
vs.
NICHOLAS J. STEIGLEDER and CHRISTINA STEIGLEDER, His Wife, Defendants.
} In Equity. No. 1046.

It is hereby stipulated between the plaintiff, by her attorney, and the defendants, by their attorneys, that the transcript of the record on the writ of error in the above entitled cause shall be made up of the following papers, to-wit:

Bill of complaint, answer to bill, memorandum of decision on defendants' motion to dismiss for want of jurisdiction, memorandum decision on the merits, and decree; together with the certified question on appeal herein, which said certificate contains, *inter alia*, the motion to dimiss for want of jurisdiction. It is stipulated that the issues made by the pleadings herein may be abbreviated in said certified question on appeal; that appellant may mention in general terms the issues and refer to the pleadings in the transcript.

It is stipulated that all the other papers and files appertaining to said cause may be omitted from the record.

Dated March 7, 1904.

GEO. McKAY,
Attorney for Plaintiff.
EMBREE & COLE,
Attorneys for Defendants.

Indorsed: Stipulation as to making up record. Filed in the U. S. circuit court dist. of Washington Mar. 7 1904 A. Reeves Ayers, clerk, H. M. Walthew, deputy.

61 UNITED STATES OF AMERICA, ss:

To Katherine Auguste McQuesten:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden in the city of Washington, District of Columbia, within sixty (60) days from the date of this citation, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of

Washington, northern division, wherein you, the said Katherine Auguste McQuesten, are plaintiff and appellee, and Nicholas J. Steigleder and Christina Steigleder, his wife, are defendants and appellants, to show cause, if any there be, why the decree in that appeal described should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this March 7, 1904.

[Seal U. S. Circuit Court, Dist. of Washington.]

H. C. HANFORD,
United States District Judge, Presiding in Circuit Court.

Service of the foregoing citation and copy thereof acknowledged this March 7 1904.

GEO. McKAY,
Attorney for Katherine Auguste McQuesten.

Indorsed: Citation on appeal. Filed in the U. S. circuit court dist. of Washington Mar. 7 1904 A. Reeves Ayres, clerk, H. M. Walthew, deputy.

62 In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

KATHERINE AUGUSTE MCQUESTEN, Complainant and Appellee,
vs.
NICHOLAS J. STEIGLEDER and CHRISTINA Steigleder, His Wife, Respondents and Appellants.
} No. 1046. Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Washington,* } ss:

I, A. Reeves Ayers, clerk of the circuit court of the United States for the district of Washington, do hereby certify the foregoing sixty one (61) typewritten pages, numbered from 1 to 61 inclusive, to be full, true and correct copies of papers, records and proceedings in the above and therein-entitled cause, as such papers, records and proceedings are now on file and of record in the office of the clerk of said circuit court at Seattle in the northern division of the district of Washington; and that the same constitute the record on the appeal in said cause of the respondents above named, from the circuit court of the United States for the district of Washington, northern division, to the Supreme Court of the United States.

I further certify that I hereto annex and herewith transmit the original citation issued in said cause.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of $18.65, and that the same has been paid to me by respondents and appellants above named.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, this 24th day of March, 1904.

{Seal United States Circuit Court, District of Washington, Northern Division.}

A. REEVES AYERS,
Clerk U. S. Circuit Court, District of Washington,
By R. M. HOPKINS,
Deputy Clerk of said Court.

63 UNITED STATES OF AMERICA, *ss:*

To Katherine Auguste McQuesten:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden in the city of Washington, District of Columbia, within sixty (60) days from the date of this citation, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Washington, northern division, wherein you, the said Katherine Auguste McQuesten, are plaintiff and appellee, and Nicholas J. Steigleder and Christina Steigleder, his wife, are defendants and appellants, to show cause, if any there be, why the decree in that appeal described should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this March 7, 1904.

{Seal United States Circuit Court, District of Washington, Northern Division.}

H. C. HANFORD,
United States Circuit Judge, Presiding in Circuit Court.

Service of the foregoing citation and copy thereof acknowledged this March 7, 1904.

GEO. McKAY,
Attorney for Katherine Auguste McQuesten.

64 [Endorsed:] No. 1046. In the circuit court of the United States district of Washington northern division In equity. Katherine Auguste McQuesten, plaintiff, *vs.* Nicholas J. Steigleder and Christina Steigleder, his wife, defendants. Citation on appeal. Filed in the U. S. circuit court, dist. of Washington, Mar. 7, 1904 A. Reeves Ayres, clerk H. M. Walthew deputy Embree & Cole, attorneys for defendants. Rooms 415–413 Pioneer building Seattle, Washington.

Endorsed on cover: File No. 19,302. Washington C. C. U. S. Term No. 227. Nicholas J. Steigleder and Christina Steigleder, his wife, appellants, *vs.* Katherine Auguste McQuesten. Filed April 20", 1904. File No. 19,302.

APPELLANT'S BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM 1904

No. 227

NICHOLAS J. STEIGLEDER AND CHRISTINA STEIGLEDER, his wife,

Appellants,

vs.

KATHERINE AUGUSTE McQUESTEN.

BRIEF OF APPELLANTS

STATEMENT.

Complainant in her bill of complaint prays it be decreed that defendants hold in trust for her the title to the real property in said bill of complaint described. Complainant, endeavoring to allege matter justifying such prayer and decree, all of which is more at length set out in her bill of complaint (Record, pp 1 to 6 inclusive), and as the sole question to be determined and the one certified to this Honorable Court is: "Did the Court err in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction?" (Record, p. 20.) Also: "The above named defendants, Nicholas J. Steigleder and Christina Steigleder, come now and say

that in the Record and proceedings in the above entitled cause, and in the decree dated February 4th, 1904, there is manifest error, to-wit:

I.

"The Court erred in taking jurisdiction of the bill of complaint and of the person of plaintiff herein, and also on June 10th, 1903, in denying defendants' motion to dismiss herein for want of jurisdiction.

II.

"The Court erred in entering a decree on February 4th, 1904, against defendants Steigleder and in favor of the plaintiff, said Court having jurisdiction neither of plaintiff nor said cause," (Record, p. 35) we deem it unnecessary to further refer to the bill of complaint, save to state that said bill in none of its allegations alleges that complainant is a resident of any place, and that jurisdiction herein depends upon the citizenship of the parties.

Defendants demurred to said bill for want of equity, said demurrer being overruled (Record, p. 19), and thereafter answered (Record, pp. 7 to 11); said cause was then referred to a master to take testimony, and after the testimony was taken defendants moved the Court to dismiss said action *inter alia* "for want of jurisdiction of this Honorable Court" and "that for grounds in support of said motion defendants show:

I.

"That the complainant is a resident of this State, and has been a resident of this State long prior to the commencement of this action, to-wit: since June, 1902, and that defendants are also residents of this State, as will more fully appear by reference to the evidence filed herein." (Record, p. 19.)

On June 23, 1903, the Honorable Judge of the United States Circuit Court filed a memorandum of decision de-

nying defendtns' motion to dismiss for want of jurisdiction (Record, pp. 11, 12 and 13), and again in its "Memorandum Decision on the Merits" the Honorable Court said: "On the question as to the citizenship of the complainant, and the Court's jurisdiction of this suit, I adhere to the decision heretofore rendered." (Record, p. 13.) Subsequently a decree was rendered in favor of complainant and against defendants. (Record, pp. 17 and 18.)

SPECIFICATION OF ERROR.

The Court erred in taking jurisdiction of the bill of Complaint and not dismissing it for want of jurisdiction, for the reason that the residence of complainant is neither distinctly nor positively averred in the bill of complaint, nor does it affirmatively appear in any other part of the Record.

ARGUMENT AND AUTHORITIES.

The bill of complaint is silent in so far as complainant's residence is concerned. The caption or prelude, it is true, contains the following statement:

"To the Judges of the Circuit Court of the United States for the District of Washington, Northern Division:

"Katherine Auguste McQuesten, a citizen of the United tSates and of the State of Massachusetts, and residing at Turner's Falls in said State, brings this her bill of complaint against Nicholas J. Steigleder and Christina Steigleder, his wife, citizens of the State of Washington, and residing at the City of Seattle, in said State, and thereupon your oratrix complains and alleges:" "I" (Record, p. 1.)

This certainly cannot be claimed to be an allegation or averment, for complainant says, "and thereupon your oratrix complains and alleges: I., * * * II., * * * III.," etc., and believing it will be conceded that "as the

jurisdiction of the Circuit Court is limited, in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, *the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears.* * * * That where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, *should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the Record,*" [Grace vs. American Central Insurance Co., 109 U. S. 278 on 283-284; Hanford vs. Davis, 163 U. S. 273; (16 Supreme Court Reporter, 1051 on 1053)] the only balm in Gilead remaining for complainant lies in the Record; we search and what do we find?

Upon the trial complainant testified (Record, pp. 20 and 21):

"Q. What is you business?"
"A. Dry and fancy goods, *it was, but not now.*"

I sent him (defendant Nicholas J.) $3,600.00 to invest in Seattle real estate. (Record, p. 20). At the time my brother sent me these letters I was living in Turner's Falls, Massachusetts, and my brother in Seattle.

"Q. What business are you carrying on now, Mrs. McQuesten?"
"A. I do not have any business just now."
"Q. How long since you were carrying on any business?"
"A. I sold out the first of June, 1902.'
"Q. Have you any business in Turner's Falls, Massachusetts, now?"
"A. I have no business except bills to collect."
"Q. Any property in Turner's Falls, Massachusetts?"
"A. No, no property in Turner's Falls."
"Q. Don't you own any real estate there at all?"
"A. I never did."
"Q. Any personal property except some bills?"
"A. Not at present."

"Q. When did you go away from Turner's Falls, Massachusetts?"

"A. I left Turner's Falls to come here June 16th, 1902."

My family consists of myself and son. We have been living here since June, 1902. My stay here is very uncertain on account of my health. I do not feel good. My son and I have been and are now living and keeping house in one of my own houses (Record, p. 22), and collecting $60.00 per month rent for the other three houses which I own.

"Q. And this investment here in Seattle is the first investment in real estate that you ever made, is it not?"

"A. Yes, sir."

"Q. Now you collected rents for these houses since March last?"

"A. Yes, sir."

"Q. Now, Mrs. McQuesten, did your brother ever write you or urge you to send money here to buy real estate with?"

"A. *He urged me to come to live here, yes.* I refused in October to come, and he urged me to come after that." (Record, p. 23.)

Defendant Nicholas J. testified (Record, p. 24):

During all the time my sister was in Turner's Falls in business I corresponded with her. She sold out her business there, I think, in January, "she wrote me that she sold everything." She came here in June, 1902.

"Q. Did she or did she not bring her household goods with her?"

"A. Yes, sir; she brought them here. She has no other goods or personal property or real estate in Massachusetts. She keeps house here with her son."

"Q. Do you know whether or not she came here to live?"

"A. Yes, sir."

"Q. Do you know if she has abandoned her residence in Massachusetts?"

"A. I know she has."

She wrote me once that she would like employment for her son in the electrical business here and I got him a position in Clark's on Second avenue. She was sick there for several years and was under treatment of several doctors. I wrote her once that I thought the climate here would be very good for her health and might be to her advantage if she moved here.

"Q. Well, confine your statement now to what was said about her residence here, what she wrote in reference to moving here and living here. That is what I want to bring out now."

"A. Well, she wrote me once that she would come out here *to live*, but first she would go to Germany to visit her son and bring him back in the fall, probably in September, and I should look up a house for her, some rooms, so it would be all provided when she came here."

"Q. Do you know whether or not she ever intended to go back to Massachusetts again?"

"A. She never said so."

These letters which I received from her were destroyed before this suit was commenced. (Record, p. 25.)

Elizabeth Bamberger testified: I know Mrs. McQuesten and heard that she had sold out her business in Turner's Falls.

"Q. Well, did she ever say anything to you about It?"

"A. Yes, sir."

"Q. That she had closed out her business there?"

"A. Yes, sir."

"Q. Did she ever say anything to you about coming to Seattle to live?"

"A. After she was here we spoke together, yes, but not before."

"Q. What did she say to you about it?"

"A. Well, she wanted to stay here with her brother Joe, and they wanted to be united together, and she thought it was all right."

"Q. Did you ever hear her say whether or not she intended to make this her home, her residence?"

"A. To make Seattle her home, so much as I understood." (Record, p. 26.)

Complainant being called in rebuttal said in answer when asked by her solicitor:

"Q. When you came here, Mrs. McQuesten, what was your purpose or intention as to residence or staying here?"

"A. I came here on the representation of these letters in regard to my health, one thing; having my boy learn his trade, *and to live with my relatives*, if we could possibly get along, and if it was all agreeable I should stay, otherwise I should not, that was my intention."

"Q. Have you at any time any intention—any fixed intention to remain here?"

"A. If everything had been agreeable, and if everything would have been in my favor, I didn't know as what I would have stayed; otherwise I felt that I was not obliged to stay unless I liked——"

"Q. Now, what is your present intention as to staying here or going away?"

"A. My present intention is not to stay here, but to go back to my *old home, for how long I could not say, but I thought I would go back to look after my accounts and have my friends there. How long I cannot say.*"

Cross-Examination.

"Q. You came here and stayed a while and found it was not agreeable, but your idea in coming here, if I understand you directly, *was first to get a situation for your son*——"

"A. First, my health was No. 1——"

"The Master: Wait until the question is completed."

"Q. (continuing.) *Second to be near your friends, and third your health? Those were the motives which induced you to come to Seattle?*"

"A. *Yes, I guess so.* I had never been in Seattle, and didn't know what it was; *I came in response to these letters.*" (Record, pp. 26 and 27.)

We have endeavored to state only so much of the testimony as in our judgment shows the intent of com-

plainant, however, the exhibits introduced by complainant herself and the letters which she wrote to defendant are to our minds conclusive even if the foregoing testimony did not settle it beyond all doubt. In complainant's Exhibit E (Record, p. 29), same being a letter written by defendant Nicholas J., he says: "I am very glad to know that you will come *to live here* with us and have Albert to join." Again, Exhibit U (same page) says: "If you go abroad you perhaps will stay all summer and come here in the fall; at any rate, I should be glad to see you *locate here*, because I know it will benefit you very much. * * * I am sure Albert will like it when he comes here, and he will find easily something to his liking."

Again, on page thirty (same exhibit), says: "In regard to your piano, you should also make an arrangement how to send it. * * * Of course, nice furniture like that has more value than you can get for it in selling, and you might as well ship it." Exhibit C (Record, p. 32) says: "So when you come here in the fall, you have an income, and can live without any trouble. I am very glad to know that you are coming, and bring Albert, for this is a growing country with plenty of opportunities for young fellows." Exhibit M (Record, p. 33) says: "This memorandum of agreement between N. J. Steigleder, of Seattle, King County, State of Washington, party of the first part, and Mrs. K. A. McQuesten, *of same place*, party of the second party, witnesseth:"

Defendants' Exhibits 2 and 3, same being letters signed by complainant herself, are certainly cogent, to-wit (Record, p. 31): "I have a hard task before me, the packing I hope to get along all right, I shall miss my home very much, almost eighteen years I have been in here and I am much attached to the house. I hope, Joe, that you will take a house in a quiet neighborhood when we come next fall"

Exhibit 3, pp. 32 and 33, says: "*In regard to our future home* I would say, that of course a seven-room house is not large enough for us all, your mother-in-law now being with you, and I thought, Joe, to tell you that we probably need one of the houses, the one closest to you,

for ourselves, that is more than we need, but I cannot do without several rooms. * * * Albert looks ahead with great expectations to the journey as well as to *his new home.*"

We certainly are at a loss to know upon what theory or how the Honorable Circuit Court could for a moment consider that complainant's residence was anywhere excepting in the State of Washington. Every act, every thought, every expression used in the entire testimony and in the exhibits shows that it was the intention of complainant, as she herself says in defendants' Exhibit 3, to make Seattle her "future home," and Exhibit M, which she introduced herself, says: "Mrs. K. A. McQuesten, of same place." Again the complainant, when she was recalled in rebuttal, after having been coached by her counsel that it was necessary for her to show her residence in Massachusetts, would not even then testify that Turner's Falls was her residence. (Record, pp. 26 and 27) she says: "I came here on the representation of those letters * * * and to live with my relatives." It is true, on page 27, she says: "My present intention is not to stay here, but to go back to my old home, for how long I could not say, but I thought I would go back to look after my accounts and have my friends there. How long I cannot say." The law seems well settled that the "present intention" of a party cannot be considered; if anything at all, it must be the intention of the party at the time of the filing of the complaint. Mattingly v. Northwestern Virginia R. Co., 158 U. S., 53 (15 Supreme Court Reporter, 725).

And then on cross-examination she says in answer to the question:

"* * * Your idea in coming here, if I understand you directly, was first to get a situation for your son, second to be near your friends, and third your health? Those were the motives which induced you to come to Seattle?" "A. Yes, I guess so," etc.

We believe we would be imposing upon this Court to take more time in presenting this matter or to further cite from the record; the citizenship of complainant was

not averred in the complaint, nor is it shown by the Record.

The describing of plaintiff as "A citizen of London, England, is insufficient."

Stuart vs. City of Easton et al., 156 U. S., 64 (15 Supreme Court Reporter, 268).

Again, in the case of Cameron vs. Hodges, 127 U. S., 322 on 325, Mr. Justice Fuller says:

"The allegation which was made in that case that Cease, who was the plaintiff, in the action in the Circuit Court for the Western Division of Texas, 'resides in the County of Mason and State of Illinois,' was held not to be a sufficient averment of his citizenship in Illinois." The same is substantially held in Horne vs. George H. Hammond Company, 15 Supreme Court Reporter, 167, and emphatically affirmed in Sun Printing and Pub. Asso. vs. Edwards, 194 U. S., 377. (24 Supreme Court Rep., 696.)

But why multiply authorities on an obviously settled question. The evidence certainly shows complainant had abandoned her residence and home at Turner's Falls and had her residence, domicile, citizenship and family and her all, save a few bills, in Seattle, and that it was her fixed intention to remain here and make Seattle her permanent home; if not, why did she in writing speak of Seattle as her "future home?"

It is true, as stated in the Record, pp. 12 and 13, "a domicil once acquired is presumed to continue until it is shown to have been changed. Where a change of domicil is *alleged*, the burden of proving it rests upon the person making the allegation. To constitute the new domicil two things are indispensable: *First, residence in the new locality; and, second, the intention to remain there.* The change cannot be made except *facto et animo.* Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are

axiomatic in the law upon the subject. Mitchell v. United States, 21 Wall., 353; 6 Am. & Eng. Encyc. of L. (2nd ed.), 32; 10 Am. & Eng. Encyc. of L. (2nd ed.), 7-16; In re Williams, 99 Fed. Rep., 544; Morris v. Gilmer, 129 U. S., 315." And upon this rule of law and the authorities just cited, applied to the facts in this case, we are willing to rest. Complainant obviously resided in the "new locality" in her own house, with her son, her personal effects, her own household furniture which was brought from Turner's Falls, including her piano, and came intending to make Seattle her future home. What seems passing strange to us is, it having been testified to by Nicholas J. Steigleder and by Mrs. Bamberger, that complainant had abandoned her residence in Massachusetts and had come to Seattle to live, why was she not asked by her counsel when put upon the stand in rebuttal, if he dared ask her, whether she had so abandoned her residence there and whether she considered herself a citizen of Massachusetts or Washington at the time of the bringing of this suit.

In order to hold that she was not a resident of Seattle, Washington, we must brush aside not only the Fourteenth Amendment to the Constitution, but also her letters, and every adjudicated decision upon this subject.

We confidently assert that complainant's citizenship is nowhere expressly averred in the Record, nor are facts therein stated which in legal intendment constitute such allegation; nor is the same established by evidence.

Respectfully submitted,

JOHN E. HUMPHRIES,

and

GEO. B. COLE,

Attorneys for Appellants.

602 Mutual Life Building,
Seattle, Washington.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1904

No. 227

NICHOLAS J. STEIGLEDER AND CHRISTINA STEIGLEDER, his wife,

Appellants,

vs.

KATHERINE AUGUSTE McQUESTEN,

Respondent.

REPLY BRIEF OF APPELLANTS.

If we read respondent's brief literally, upon the second page wherein it states, "1. In her Bill of Complaint the respondent *states* the diversity of citizenship in these words," etc., we must take it as an admission on respondent's part that she does not *allege* diversity of citizenship. It appears to us so plain that this statement in the Bill of Complaint is not an allegation but is a preamble or general statement before an allegation, that further comment is hardly necessary.

This being no allegation, there was no occasion for denying it. In fact, how could it have been denied? It is not alleged in paragraph 1 or any subsequent paragraph of the complaint thereafter, hence it was impossible to deny it; impossible to even deny or attempt it, for the reason that it was not alleged.

The case of Hartog vs. Memory, 116 U. S. 588, cited by respondent, is diametrically opposed to respondent's theory, as the court say on page 590, "It was well settled before the act of 1875, that when the citizenship necessary for the jurisdiction of the courts of the United States appeared on the ~~facts~~ face of the record, evidence to contradict the record was not admissable, except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction." No such a plea is necessary at this time, and especially when there is no allegation in the Bill of Complaint showing diversity of citizenship. Counsel for respondent is apparently laboring under the delusion that it was necessary for appellants to allege and

prove diversity of citizenship. In this he certainly is in error and the rule and law is fundamental.

One short paragraph of the record, on page 20, to-wit, "Now, therefore, I do certify to the Supreme Court the sole question of the jurisdiction of this court in said cause, to-wit: did the court err in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction," answers the principal argument of respondent herein. Respondent, on page 3 of her brief, endeavors to draw a distinction between plaintiff's residence and her domicile or citizenship. We care not by what name it is called. We do insist that there is no allegation in the Bill of Complaint, nor is there any evidence in the record to show plaintiff was a resident of the State of Massachusetts, but on the contrary, we again state that it affirmatively appears in the record that she was a resident of Seattle, Washington; that she had no home, domicile or interests in Massachusetts, but that her home, domicile, all her real estate, all her interests and all of her money and family were in Seattle.

The closing sentence, in the opinion of the Honorable Circuit Court, on the motion to dismiss for want of jurisdiction, on page 13, of the record, shows that after the evidence was all introduced, and the motion was made to dismiss, the court then found no evidence that complainant was born in the United States. Thereafter testimony was introduced to bolster up this weakness, and if it had been possible for respondent to have strengthened her position as to her citizenship or domicile, she certainly would have done so again, especially with a counsel with such marked ability for ingenuity and splitting of hairs as is exhibited in the brief before us.

Respondent's counsel say on page 8 of their brief, that the fair inference is defendants waived the defect of jurisdiction, thus admitting there is a defect of jurisdiction, but justifying upon the theory that appellants waived it. We brush this entire argument aside by merely suggesting to this Honorable Court that jurisdiction is not waived by inference, and that this question has been disposed of as we stated in our opening brief, to-wit: "The presumption is that the cause is without its jurisdiction unless the contrary affirmatively appears:" Grace vs. American Central Life Insurance Co., 109 U. S. 278-283. Again it will be borne in mind that plaintiff never introduced evidence touching upon her domicile or citizenship until after this had been brought out by defendant's counsel.

Counsel again say on page 9 of their brief, that "no question of jurisdiction is presented by the record." Now if no question of jurisdiction is presented by the record, we are at a loss to know how one can be, and what is presented. If we understand the law correctly, when the Honorable Circuit Court certified the question of jurisdiction to this Honorable Court, as shown on page 20 of the record supra, that certification was all that the law requires, and the authorities cited by respondent on page 10 of *his* brief, fully sustains this position. In the case of Maynard v. Hecht, cited by respondent, 151 U. S. 324, Mr. Chief Justice Fuller, in his statement of the case, says, "No certificate of question for decision was applied for or granted by the court," and again, in the opinion, the court say, "We are of opinion that the absence of such certificate is fatal to the maintenance of the writ of error in this cause." In The Bayonne, 159 U. S. 687, cited by respondent, a cursory reading of the last paragraph of the syllabus shows that that case is not applicable to the case at bar, to-wit, "The judge entered therein "appeal allowed." Held, that this was entirely insufficient to answer the purposes of a certificate of jurisdictional questions." And in the opinion, it cites Maynard vs. Hecht, supra. Again in Van Wagenen vs. Sewall, 160 U. S. 369, cited by respondents, Mr. Justice Brown, rendering the opinion of the court, says, "In such cases, however, "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision," there is an entire absence of such certificate in this case," and further on in said opinion, Mr. Justice Brown again says, "So, also, in Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, where the court below, granted the appeal, said, "this appeal is granted solely upon the question of jurisdiction" and made further provisions for determining what part of the record should be certified to this court under appeal, we held this to be a sufficient certificate of a question of jurisdiction under the act."

Bearing in mind that this last quotation is from a case cited by respondent's counsel, and applying it to the case at bar, what do we find? On page 18 of the record, commences the certificate of the Honorable Circuit Judge; and on page 20, the sole question of jurisdiction is certified to this court; also "so much of the record as is necessary for the determination of the question o fjurisdiction," is also certified; and on page 35

it is ordered that an appeal be allowed as prayed for." We ill not impose upon this court by further commenting, except say that should the court find that there is any defect in rm, we respectfully ask leave to amend.

Respondent's counsel, on page 11, apparently forgot that page 20 of the record, the Honorable Circuit Judge certi- d that so much of the record as was necessary for determin- g the question of jurisdiction was sent to this court, and we re frank to admit that this is the first time we ever learned at this court could consider testimony not in the record, to y nothing of the astounding statement that the court should nsider it "prima facie correct"; especially when the court as certified as aforesaid; and we frankly submit that this court annot find that the court below was correct in its conclusions to the diversity of citizenship unless it goes outside of the cord as is requested by respondent's counsel, and this we ow this court will not do. There was no other testimony in is case showing respondent to be a resident of or having her micile in Massachusetts or any other place than Seattle, and there had have been, it was the duty of respondent's counsel see that such statement was in the record. No testimony of y kind, not even implication, can be found showing plaintiff tained one vestige of a domicile in Massachusetts.

It will be noticed that on page 7 of the record, that the fendants, saving to themselves all manner of benefit of ex- ption or otherwise, that can be or may be had or taken to the any errors, uncertainties and imperfections in said bill, did en answer unto plaintiff's complaint, thereby throwing about emselves all protection possible when they were forced to nswer thereunto. Again this is not the jurisdiction which can waived. How can defendants waive plaintiff's jurisdic- on; they might waive their own, but not plaintiff's.

We frankly submit that when the brief of respondent's unsel is read in the light of the record and in the light of the w, respondent has utterly failed to show that the lower court ad any jurisdiction of the complainant herein, and that appel- nts are entitled to a decision of this court in their favor.

Respectfully submitted,

JOHN E. HUMPHRIES and
GEO. B. COLE,
Attorneys for Appellants,
Seattle, Wash.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1904

No. 227

NICHOLAS J. STEIGLEDER and CHRISTINA STEIGLEDER, his wife,

Appellants.

vs.

KATHERINE AUGUSTE McQUESTEN,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE.

This appeal attempts to challenge the jurisdicton of the Court below.

Federal jurisdiction is predicted on a diversity of citizenship and the appellants contend that a diversity of citizenship does not appear. The history of this question as presented by the record is as follows:

1. In her bill of complaint the respondent states the diversity of citizenship in these words: "Katherine Auguste McQuesten, a citizen of the United States and of the State of Massachusetts and residing at Turners Falls in said State, brings this her bill of complaint against Nicholas J. Steigleder and Christina Steigleder, his wife, citizens of the State of Washington and residing at the City of Seattle in said State." (Transcript of Record, p. 1.)

2. To the bill, the defendants below (Appellants in this Court) demurred for want of equity, and their demurrer was overruled. (Transcript of Record, p. 19.)

3. The defendants below then answered on the merits without even suggesting a question of jurisdiction. (Transcript of Record, pp. 7-8-9-10.)

4. The case was referred, proofs taken in full, and after the proofs had been taken, the defendants below (Appellants in this Court) made a motion in words and figures as follows:

I.

"That the above entitled action be dismissed for want of jurisdiction of this Honorable Court.

II.

For Damages and Solicitor's Fees.

That for grounds in support of said motion, defendants show:

I.

That the complainant is a resident of this State, and has been a resident of this State long prior to the commencement of this action, to-wit: Since June, 1902, and

that the defendants are also residents of this State, as will more fully appear by reference to the evidence filed herein.

II.

That complainant unnecessarily consumed a large amount of time in taking evidence before the master in chancery herein, to-wit: For five days, when one or two days would have been ample to have taken all testimony on behalf of complainant, all of which will more fully appear by reference to the testimony filed herein." Transcript of Record, pp. 19-20.

The Court will notice in passing that the motion challenges merely the plaintiff's *residence*, not her domicil, or citizenship.

5. The foregoing motion was argued and overruled; the Court's opinion is brief and reads as follows:

"The question which the Court has now to decide is whether the complainant can maintain her suit in this court as a citizen of the State of Massachusetts. The bill of complaint contains proper and sufficient averments to authorize the bringing of the suit in this court on the ground that the complainant is a citizen of the State of Massachusetts and the defendants citizens of the State of Washington, and the averments of jurisdictional facts are not controverted by the onswer or any special plea, therefore the court is warranted in taking cognizance of the case until it appears affirmatively that the complaint is not true in fact. The motion to dismiss is based upon an assumption that by the evidence it does appear affirmatively, that at the time of the commencement of the suit the complainant was not a citizen of the State of Massachusetts, because she had changed her residence from Massachusetts to the State of Washington and was then residing in the State of Washington. The evidence shows that at the time of commencing the suit, and for about four months

previous, she was and had been living in this State with her son, the two being the only members of the family. Jurisdiction, however, depends upon citizenship, and not upon the place of residence. It is true that by the 14th amendment to the Constitution, citizens of the United States are also citizens of the State in which they reside, but it has been settled by numerous decisions that a mere temporary change of residence from one State to another does not work a change of citizenship. In order that a change of citizenship from one State to another should affect the right of bringing a suit in a Federal Court, it must be made with a *bona fide* intention of becoming a citizen of the State to which the party removes. 6 Am & Eng. Encyc. of L., 2nd Ed., 32. The real question to be decided relates to the permanent domicil of the complainant rather than to the place of which she was an inhabitant at the time of commencing the suit.

"By the undisputed evidence it appears that she lived in the State of Massachusetts, and was permanently settled there, for a period of twenty years prior to the month of January, 192, and at that time on account of failing health she disposed of a mercantile business which she had been carrying on, and went to Europe, then returned to Massachusetts, remained there a few days, and she then came to this State, bringing with her all of her personal effects, and took up her residence in a house which she owned. Her intention at the time of coming was to try the effect of a change of residence upon her impaired health, and she entertained hopes of finding here a favorable opportunity for her son to learn a trade, and also of deriving pleasure from a residence near to her brother and his family, but she had not previously visited this State, and did not know whether the change would be beneficial or agreeable, and her mind was unsettled as to whether she would remain permanently or return to Massachusetts. In a short time after coming she found that she could derive no pleasure from living near her brother.

and his family, and as her health was not improved she decided to return to Massachusetts and resume her residence there among her friends and acquaintances. Under these circumstances, the Court cannot find as a fact that the complainant has acquired a domicil in the State of Washington, nor that she lost her domicil in the State of Massachusetts."

"A domicil once acquired is presumed to continue until it is shown to have been changed. Where a change of domicil is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicil two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicil for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject."

"*Mitchell, v. United States*, 21 Wall. 353; 6 Am. & Eng. Encyc. of L., 2nd Ed. 32; 10 Am. & Eng. Encyc. of L., 2nd Ed., 7-16; *In re Williams*, 99 Fed. Rep. 544; *Morris v. Gilmer*, 129 U. S. 315.

"I have not found in the evidence that the complainant was born in the United States, nor that she was naturalized or married to a citzen but as the pleadings raise no issue with respect to her citizenship, the Court will assume that she is a citizen of the United States until it is shown affirmatively otherwise. Motion to dismiss denied.

C. H. HANFORD, Judge."

Transcript of Record, pp. 11-12-13.

6. The case was afterwards argued on the merits and a decree rendered in favor of the plaintiff below, for the relief prayed for. So much for the history of this question.

THE QUESTION OF JURISDICTION AS PRESENTED BY THE RECORD.

1. In the assignments of error the question of jurisdiction is stated in this language:

I.

"The Court erred in taking jurisdiction of the bill of complaint and of the person of plaintiff herein, and also on June 10th, 1903, in denying defendants' motion to dismiss herein for want of jurisdiction."

II.

"The Court erred in entering a decree on February 4th, 1904, against defendants Steigleder and in favor of the plaintiff, said Court having jurisdiction neither of plaintiff nor of said cause." Transcript of Record, p. 35.

The assignments of error are clearly insufficient to raise the question of jurisdiction or any other question: the Court is obliged to look beyond the assignment and into the testimony to discover the point raised.

2. In the petition for appeal no definite question of jurisdiction is stated; it refers to the assignment of errors for a statement of the question. Transcript of Record, pp. 34-35.

3. In the certificate of the Court the question is stated in the following language: "Did the Court err in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction?" Transcript of Record, p. 20. We submit that no question of jurisdiction is raised by the record.

ARGUMENTS AND AUTHORITIES.

I.

The defendants below (Appellants here) did not raise

the question of jurisdiction by any pleading; but on the contrary submitted to the jurisdiction; first, by demurring generally for want of equity; second, by answering without even suggesting a question of jurisdiction; third by going into the taking of testimony on the merits generally and taking testimony in full, before even suggesting a question of jurisdiction.

We submit the appellants cannot challenge the jurisdiction to which they voluntarily submitted. They may waive the error, if any, in taking jurisdiction. There is no pretense that they were misled or that they have made any new discovery; they knew as well when they first appeared in the action, as after the testimony was taken, whether the plaintiff was a citizen of Massachusetts or not; and with full knowledge, they voluntarily submitted to the jurisdiction of the Federal Court without even suggesting a doubt as to the diversity of citizenship. After the testimony had been taken, and then thinking that the testimony on this point was not very full, they made their motion to dismiss; we submit this motion is nothing more than a suggestion to the Court to do what it might have done without a motion, viz: Dismiss the action, if it appears "That such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court." This motion does not entitle the defendants to insist that the Court shall dismiss the action; it might have been error, of which the plaintiff below could have complained, if the Court had dismissed the action; but so far as the defendants below are concerned they had voluntarily submitted to the jurisdiction with their eyes open, and they thereby waived any error, if error there was, in the action of the Court in refusing to dismiss the suit.

Their waiver of the point would not deprive the Court of the power to protect itself by dismissing the suit, *on its own motion*, if the jurisdiction was wrongfully invoked, but this power of the Court does not deprive the defendants of the power to waive all questions as to juris-

diction and by waiver to close their mouths, by a sort of estoppel, to urge the point, as error. Prior to 1875, the jurisdiction could not be challenged except by a plea to the jurisdiction. Since the enactments of the statute of 1875 the Court has possessed the power on its own motion at any stage of the proceeding, to dismiss whenever its rightful jurisdiction is wrongfully invoked; but this corrective power possessed by the Court has never been held to be a legal right of the parties. If the parties voluntarily submit to the Federal jurisdiction and make a proper case in their pleadings neither can challenge the Court's action in retaining jurisdiction even though there may not be an actual diversity of citizenship. In such a case the Court may protect itself from imposition, but this power is not a legal right in either party, which he cannot waive, either (*a*) expressly by his pleadings or (*b*) impliedly, by going to trial on the merits. If the defendants wished to insist that the plaintiff had improperly brought her suit in the Federal Court, they should at the earliest moment have challenged the jurisdiction by a formal pleading of some sort; if the defendants intend to insist upon the defect of jurisdiction they should plead it the same as before the enactment of the statute of 1875 and if they do not, they should not be allowed to raise the question, although the Court may protect itself from imposition by dismissing on its own motion. That the defendants may waive the defect of jurisdiction is the fair inference from the language of this Court, though there seems to be no authority directly in point. This Court has said: "And when the defendant has not so pleaded as to entitle him to object to the jurisdiction," etc. *Hartog v. Memory*, 116 U. S. 588, quoted with approval in *Wetmore v. Rymer*, 169 U. S. p. 122. This language was used in reference to the exercise by the Court of the same power which the appellants insist the Court below should have exercised in their favor, although they submitted to the jurisdiction and did not so plead as to entitle them to challenge the jurisdiction. This language clearly implies that the parties may by their voluntary action waive the

defect, if any, of jurisdiction so that neither could complain if the Court *retains* jurisdiction. So far, the Federal jurisdiction has been sustained on some other point, and the Court has never, so far as we can find, been compelled to consider whether the defendant, who with full knowledge, submits to the jurisdiction, can insist that it is error in the Court to retain jurisdiction. Prior to the Act of 1875, jurisdiction must have been challenged by plea, or it was waived; this shows clearly that the *parties* may waive a defect of jurisdiction; and giving the Court the power on its own motion to dismiss, does not deprive the parties of the power to waive the question, and place themselves where they cannot complain if the Court retains a jurisdiction to which they have submitted.

The plaintiff cannot complain because he has alleged the diversity of citizenship; and the defendant cannot complain because he has, with full knowledge, voluntarily submitted to the jurisdiction without questioning it. In such a case the Court may inquire whether it is being imposed upon and, if so, it may dismiss the suit, but neither party has a legal right to a dismissal nor can either complain if the Court refuses to dismiss. If the Court should dismiss the action, then would arise the question whether the evidence creates a legal certainty that the Court is imposed upon; if not the dismissal would be error.

II.

No question of jurisdiction is presented by the record.

1. The assignments of error are clearly insufficient to raise the question of jurisdiction. The question argued by appellant relates wholly to the tendency or probative force of the testimony *as to residence;* the assignments of error do not even state that the proofs show that the residence of the plaintiff was in Washington; the only part of the assignments of error that come at all near to the question argued, is stated in this language: "The

Court erred * * * in denying defendants' motion to dismiss for want of jurisdiction." (Transcript of Record p. 35.) But this assignment of error requires the Court to look beyond it, and to a motion made in the Court below and from the motion to the testimony and from the testimony to Appellants' Brief; this places the real point attempted to be raised four removes from the assignment of error. The rule requires the *assignment* to state the question raised, and the Court will not go in search of the alleged error. It must be clearly stated. The other parts of the assignments of error are still more remote and indefinite. We submit that the assignments of error are clearly insufficient under the rule.

2. In the petition for appeal the question of jurisdiction is not stated at all except by reference to the assignments of error, which, we submit, are entirely insufficient, and in the order allowing the appeal *no* question of jurisdiction is stated. Transcript of Record, pp. 34-35.

3. In the certificate the question is stated in terms even more general than in the assignment of error. "Did the Court err in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction?" is the form in which the question is stated in the certificate. Transcript of Record, p. 20.

Under the state, the rules, and the authorities, we submit, it is not enough to raise a question of jurisdiction but a *precise and definite question of jurisdiction* must be stated in the record. The jurisdiction of this Court depends upon the statement in the record, in some form, of a precise question of jurisdiction and not merely *a* question.

Our contention that the record must present a *precise* question of jurisdiction is a fair deduction from the authorities. *Van Wagenen v. Sewell*, 160 U. S. 369, p. 373; *Maynard v. Hecht*, 151 U. S. 324; *The Bayonne*, 150 U. S. 687.

III.

The Court below was clearly correct in its conclusion as to the diversity of citizenship. **Its opinion is in part a finding of facts; that part of the opinion constituting the finding of facts is as follows:**

"By the undisputed evidence it appears that she lived in the State of Massachusetts, and was permanently settled there, for a period of twenty years prior to the month of January, 1902, and at that time on account of failing health she disposed of a mercantile business which she had been carrying on, and went to Europe, then returned to Massachusetts, remained there a few days, and she then came to this Sate, bringing with her all of her personal effects, and took up her residence in a house which she owned. Her intention at the time of coming was to try the effect of a change of residence upon her impaired health, and she entertained hopes of finding here a favorable opportunity for her son to learn a trade, and also deriving pleasure from a residence near to her brother and his family, but she had not previously visited this State, and did not know whether the change would be beneficial or agreeable, and her mind was unsettled as to whether she would remain permanently or return to Massachusetts. In a short time after coming she found that she could derive no pleasure from living near her brother and his family, and as her health was not improved she decided to return to Massachusetts and resume her residence there among her friends and acquaintances. Under these circumstances, the Court cannot find as a fact that the complainant has acquired a domicil in the State of Washington, nor that she lost her domicil in the State of Massachusetts."

In making this finding of fact the Court below had the advantage of the entire testimony which this Court has not, and, we submit, this finding, even in an equity case should be taken as at least *prima facie* correct. We will examine the Court's finding in detail.

1. "By the undisputed evidence it appears that she (the plaintiff below) lived in the State of Massachusetts and was permanently settled there for a period of twenty years prior to the month of January, 1902," etc. The undisputed evidence clearly supports this part of the Court's findings. In passing it should be remarked that the house which she owned, mentioned by the Court, was purchased while she was a resident of Massachusetts; of this there is no question; although the actual conveyance to her was not made until after her return from Germany; this purchase having been determined upon while she still actually resided in Massachusetts has but little bearing upon her intention as to her permanent home; she arranged to buy it while clearly domiciled in Massachusetts and its force as evidence of a change of domicil is very slight.

2. "Her intention at the time of coming was to try the effect of a change of residence upon her impaired health, and she entertained hopes of finding here a favorable opportunity for her son to learn a trade, and also of deriving pleasure from a residence near to her brother and his family, but she had not previously visited this State, and did not know whether the change would be beneficial or agreeable, and her mind was unsettled as to whether she would remain permanently or return to Massachusetts. In a short time after coming she found that she could derive no pleasure from living near her brother, and his family, and as her health was not improved she decided to return to Massachusetts and resume her residence there among her friends and acquaintances. Under these circumstances, the Court cannot find as a fact that the complainant has acquired a domicil in the State of Washington, nor that she lost her domicil in the State of Massachusetts," will be treated as the second finding of fact. We submit, this part of the finding is clearly supported by the weight of the testimony. Mrs. McQuesten's testimony clearly sustains the finding; we quote her testimony on this point:

"Q. Before coming to this State, Mrs. McQuesten, where did you live?"

"A. I lived at Turner's Falls, Mass."

"Q. For how long a time had you lived at Turner's Falls?"

"A. I lived in Turner's Falls about twenty years."

"Q. When did you come to this State?"

"A. We came in June, 1902."

"Q. When you came here, Mrs. McQuesten, what was your purpose or intention as to residence or staying here?"

"A. I came here on the representation of these letters in regard to my health, one thing; having my boy learn his trade, and to live with my relatives, if we could possibly get along and if it all was agreeable, I should stay, otherwise I should not, that was my intention."

"Q. Have you had at any time any intention—any fixed intention to remain here?"

"A. If everything had been agreeable, and if everything would have been in my favor I didn't know as what I would have stayed; otherwise I felt that I was not obliged to stay unless I liked——"

"Q. Now what is your present intention as to staying here or going away?"

"A. My present intention is not to stay here but to go back to my old home, for how long I could not say, but I thought I would go back to look after my accounts and have my friends there. How long I cannot say."

Cross-examination.

"Q. Mrs. McQuesten, one of your objects in coming here was to get a situation for your son was it not?"

"A. Yes; I thought he could learn his trade here."

"Q. He did get a situation here for a while?"

"A. Yes, he got a situation, but it was nothing to learn there."

"Q. And it was also your desire to be near your friends and relatives?"

A. Yes. It was my desire, but it was not agreeable to be near them.

"Q. You came here and stayed a while and found it was not agreeable, but your idea in coming here, if I understand you directly, was first to get a situation for your son——"

A. First, my health was No. 1——"

The Master: "Wait until the question is completed."

"Q. (Continuing) Second to be near your friends and third your health? Those were the motives which induced you to come to Seattle?"

"A. Yes, I guess so. I had never been in Seattle; I didn't know what it was; I came in response to these letters." pp. 26-27.

This testimony clearly shows that she came to Seattle in impaired health and with a view to see what the effect would be of a change of climate, and to be near her relatives if she found it agreeable, and to have her son learn his business or trade. Whether the climate of Washington would improve her health she knew not, whether a residence near her relatives would be agreeable she knew not; and whether her son could obtain a position she knew not; manifestly until she did *know* these things she would not form an intention to remain. Before that intention was formed she learned that the climate did not improve her health; her son could not obtain the advantages she desired in the way of learning his trade; and she soon found that residence near her relatives was not agreeable; so that without forming any positive, actual intention to remain she found that every purpose she had in mind would be defeated if she remained and she definitely concluded to return. Now, one who goes to a strange country, with a view to regain his health and without any knowledge of the country to which he goes, will not be deemed to have determined to remain until the effect of the climate upon his health can be felt; this is self evident. *And if, after having tried the climate, he concludes to go back, there is no point of time when it can be said he intended to remain, and without an actual intention to remain, there is no change of domicil*

or citizenship.

A change of residence for purposes of health does not work a change of domicil.

Fidelity Trust etc. Co. v. Preston, 28 S. W. Rep., 658.
Still v. Woodville, 38 Miss. 646.
Ex parte Blumer, 27 Tex. 734.
Dupuy vs. Wurtz, 53 U. Y. 556.

The testimony of the plaintiff is practically uncontradicted; but two witnesses give any testimony on behalf of the defendants as to the citizenship of the plaintiff; one of these, Elizabeth Bamburger, (Transcript of Record, p. 26) simply says that "so much as she understood," the plaintiff was to make Seattle her home, but she evidently made no distinction between a temporary sojourn and permanent home or domicil; the other of these witnesses was the defendant Nicholas J. Steigleder himself, and the Court below, after reading his entire testimony, concludes that he is a "mendacious witness." Transcript of Record, p. 14. In any event his testimony does not show that the plaintiff had changed her domicil; it merely shows a change of residence, and this is fully explained and is consistent with the fact of domicil in Massachusetts. The letters to which the plaintiff referred in her testimony were written to her by the defendant Nicholas J. Steigler urging her to come to Washington and making representations as to the advantages of leaving her home in Massachusetts and taking up a residence in Washington. These letters certainly would not be evidence of anything except that the writer, Nicholas J. Steigleder, made certain statements; they are not evidence against the plaintiff (Respondent in this Court) that she intended to change her domicil from Massachusetts to Washington. Naturally, if she was induced by the statements to come to Washington, she would have a reasonable time to determine whether the representations were true and

whether she wished to remain, and if, before she finally concluded to remain, she found the conditions in Washington disagreeable to her, and for that reason concluded to return, there is no point of time on which the Court can fix when it can say, "Then she concluded to remain in Washington;" and never having concluded to remain in Washington she never had a domicil there.

The Court below should not dismiss the action unless there is a legal certainty of a want of jurisdiction.

Wetmore v. Rymer, 169 U. S. 115-120-121-122.
Deputron v. Young, 134 U. S. 241.
Barry v. Edmunds, 116 U. S. 550.
Maffet v. Quine, 95 Federal, 200.

In Wetmore v. Rymer, supra, the parties had gone to trial on the merits, without raising the question of jurisdiction; on the trial some evidence was introduced which, the defendants insisted, showed want of jurisdiction; the defendants moved to dismiss. The motion of the defendants was not regarded as a pleading challenging the jurisdiction, but as a mere suggestion to the Court invoking the power of the court under the Act of 1875 to dismiss where the action is not really of Federal cognizance.

If, as the authorities hold, the cuit should not be dismissed unless there is a legal certainty of want of jurisdiction, then, when the Court below deliberately passes on the question of fact, and retains its jurisdiction, the legal certainty of a want of jurisdiction is wholly wanting and it would be error to dismiss.

In conclusion we submit:

1. That the appellants, by their conduct, have waived the defect, if any, of jurisdiction, or in other words have by their conduct estopped themselves to question the jurisdiction of the Court below.

2. That no question of jurisdiction is presented by the record; and

3. That there is a diversity of citizenship, as the Court below found, as a matter of fact from the testimony; and there is, therefore, not a clear want of Federal jurisdiction.

The judgment of the Court below should be affirmed.

GEO. McKAY,
and
J. B. HOWE.
Attorneys for Respondent.

419 Arcade Block, Seattle, Wash.

Supreme Court of the United States.

No. 227.—October Term, 1904.

Nicholas J. Steigleder and Christina Steigleder, his wife, Appellants, vs. Katherine Auguste McQuesten.	Appeal from the Circuit Court of the United States for the District of Washington.

[April 24th 1905.]

Mr. Justice Harlan delivered the opinion of the Court.

The bill filed in the Circuit Court by the plaintiff, McQuesten, alleged her to be "a citizen of the United States and of the State of Massachusetts, and residing at Turner's Falls in said State," while the defendants Steigleder and wife were alleged to be "citizens of the State of Washington, and residing at the city of Seattle in said State."

The object of the suit was to obtain a decree adjudging defendants to be trustees for the plaintiff in respect of certain real estate in King County, State of Washington. The defendants demurred to the bill for want of equity. The demurrer was overruled, and the defendants answered, without making any issue as to the citizenship of the parties, but denying the alleged trust, and averring that there had been a final settlement between the parties before the institution of the suit in respect of all the matters in dispute.

The cause was referred to a master, and, after proof was taken, the defendants moved the court to dismiss the suit for want of jurisdiction, the reason assigned in the motion being only that the plaintiff was, and for a long time prior to the commencement of the suit had been, a "resident" of the State of Washington, while the defendants were "residents" of the same State.

The motion to dismiss was denied, and the case went to a decree in favor of the plaintiff upon the merits.

The defendants were granted an appeal directly to this court, the question of jurisdiction being certified.

The averment in the bill that the parties were citizens of different States was sufficient to make a *prima facie* case of jurisdiction so far as it depended on citizenship. While under the Judiciary Act of 1789 an issue as to the fact of citizenship could only be made by plea in abatement, when the pleadings properly averred citizenship, the act of March 3d 1875, 18 *Stat.*

472, c. 137, made it the duty of the Circuit Court, at any time in the progress of a cause, to dismiss the suit, if it was satisfied either that it did not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties were improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act of Congress. *Shepard* v. *Graves*, 14 *How.* 505; *Williams* v. *Nottawa*, 104 *U. S.* 209, 211; *Farmington* v. *Pittsburg*, 114 *U. S.* 138, 143; *Little* v. *Giles*, 118 *U. S.* 596, 602; *Morris* v. *Gilmer*, 129 *U. S.* 315, 326. This provision of the act of 1875 was not superseded by the Judiciary Act of 1887–8, and is still in force. *Lehigh Min. & Manf. Co.* v. *Kelly*, 160 *U. S.* 327, 339; *Com'rs* v. *Dudley*, 173 *U. S.* 243, 251; *Defiance Water Co.* v. *Defiance*, 191 *U. S.* 184, 194–5; *Minnesota* v. *Northern Securities Co.*, 194 *U. S.* 48, 66. The motion, based upon the proofs taken by the Master to dismiss the cause, was, therefore, an appropriate mode in which to raise the question of the jurisdiction of the Circuit Court.

It is to be observed that the grounds assigned for the motion to dismiss the cause, taken alone, did not distinctly raise any question concerning the absence of diverse citizenship; for the motion only stated that the plaintiff and the defendants were, respectively, residents of the State of Washington. But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the Circuit Courts of the United States; and that a mere averment of residence in a particular State is not an averment of citizenship in that State for the purposes of jurisdiction. *Parker* v. *Averman*, 18 *How.* 137; *Robertson* v. *Cease*, 97 *U. S.* 646; *Everhart* v. *Huntsville College*, 120 *U. S.* 223; *Timmons* v. *Elyton Land Co.*, 139 *U. S.* 378; *Denny* v. *Peroni*, 141 U. S. 121, 123; *Wolfe* v. *Hartford L. & A. Ins. Co.*, 148 *U. S.* 389.

But the Circuit Court treated the question of jurisdiction as raised and passed upon it. We must therefore look at the evidence bearing on that point. *Defiance Water Co.* v. *Defiance*, 191 *U. S.* 184, 194–5. The evidence warrants the conclusion reached by that court, namely, that the plaintiff was, for many years prior to the commencement of the action, a citizen of Massachusetts, and that her residence in the State of Washington, at and before the suit was brought, is not shown to be otherwise than temporary, without any fixed purpose to abandon citizenship in Massachusetts. So far as appears from the record, she was, when the suit was brought, a citizen of Massachusetts.

The Circuit Court did not err in taking jurisdiction of the cause, and it will be so certified.